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# The Influence of Queer Theory on Marriage and Civil Partnership in Scotland

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## Abstract

This thesis will explore the whether queer theory has had any real influence on the law on marriage and civil partnership in Scotland. It will do so by examining the work of Michael Foucault and Judith Butler, reviewing both *The History of Sexuality Volume One*, and *Gender Trouble* to establish what queer theory has to say on gender and sexuality. Both works expose the artificiality of gender and sexuality, and in doing so, show that marriage and civil partnership are institutions created to support these artificial structures. Marriage and civil partnership are not isolated from the continuing influence of queer discourse on both gender and sexuality; however, as I will show, the influence has been contained largely to opening up privilege, both legally and socially, to those who wish to conform to structures that remain heteronormative and prescriptive.

## Introduction

Marriage, and civil partnership in Scotland are the institutions by which relationships, presumably of romantic origin, are socially, religiously and legally recognised. Marriage attracts legal privilege, is codified as a fundamental right,<sup>1</sup> and, due to its elevated social status, is an aspiration for many. Civil partnership, a distinctively same-sex institution, mirrors the legal privileges of marriage, and, I would argue, attracts a similar, though diminished, elevation in social status. The question which this thesis will ask is what, if any, influence queer theory has had on marriage and civil partnership in Scotland.

Same-sex relationships have now reached a point of legal and social parity with those of their opposite-sex counterparts and can be formalised by entering into a marriage or a civil partnership. I will argue that, on the periphery, queer theory has influenced the equality-led discourse that led to same-sex relationships being viewed as morally equivalent to opposite-sex relationships. However, I will demonstrate that, by and large, this is where the influence of queer theory ends in relation to both institutions.

To establish the queer position on gender, sex and sexuality, I will first review *The History of Sexuality Volume One: The Will to Knowledge* by Michael Foucault. Foucault exposes the artificiality of sexuality, showing it to be a social construct rather than an objectively observed reality; sexuality was created for the purposes of social control and the deployment of power. Marriage and civil partnership are, I will argue, emanations of this discourse on power and the influence of sexuality is still heavily present within the structure of marriage, despite changes to make marriage law gender neutral. It hardly needs to be stated that civil partnership remains wedded to gender and sexuality due to its same-sex

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<sup>1</sup> European Convention on Human Rights, Article 12

nature. Foucault identifies the need to resist power; I will show that marriage and civil partnership remain, from a queer perspective, something to be resisted for that reason.

Judith Butler's *Gender Trouble* will then be reviewed. Butler develops Foucault's argument on sexuality, applying it to gender and exposing the same artificiality. Butler shows that gender is simply a performance and via a review of psychoanalysis, anthropology, the biology of hermaphroditism and drag culture, she concludes that the presumed binary simply does not exist. Sex and gender are the same thing, and neither of them has any real basis in objective truth. They are impositions, control mechanisms, artificial and, ultimately, valueless. I will demonstrate that gender is perhaps more pervasive within marriage and civil partnership than sexuality, and that the influence of gender has perhaps increased since the introduction of same-sex marriage. Queer theory, it will be shown, has had only a peripheral influence on the role of gender within marriage and civil partnership.

Following a review of Foucault and Butler, I will critique the elevated social status afforded to marriage and civil partnership, concluding that this privileged status is only achievable at the expense of other groups. From a queer perspective, I will argue that marriage and civil partnership are actually a triumph for social conservatism and are not reflective of any real queer influence.

I will then review the influence and persistence of gender rules within marriage and civil partnership. I will argue that despite the seeming gender neutrality of marriage law, gender persists within marriage and civil partnership. Gender and marital or civil partnership status are interlinked within the Gender Recognition Act 2004; I will argue that the Gender Recognition Act 2004 has been used as a vehicle for the maintenance of the gender binary, and also, historically, to ensure the hetero-exclusivity of marriage.

The influence of gender and heteronormativity is also still visible in the ‘couple’ structure of both marriage and civil partnership. I will argue that both institutions remain fixated on reflecting structures that were historically a result of gender essentialism and gender complementarianism.

Finally, I will look at religious marriage and civil partnership, examining the religious freedom protections put in place on the passing of same-sex marriage. I will conclude that religious marriage and civil partnership ceremonies create discrimination in the administration of a state function, and that religious protection rules have created legal uncertainty. It is perhaps unsurprising that I will conclude that queer theory has not influenced religious marriage at all.



# 1 The History of Sexuality Volume 1: The Will to Knowledge by Michel Foucault

## 1(1) Introduction

The History of Sexuality, Volume 1: The Will to Knowledge by Michel Foucault is, if there is any such thing, a fundamental text for queer theorists. Published in 1976, it argues that characterising our social history as one of sexual repression is inaccurate. In many ways the opposite is the case. Since the 17<sup>th</sup> Century, discourse on sex, rather than being repressed, has exploded. Discourse about sex, rather than being silenced, has taken on a number of different voices. Sex and sexuality as understood today is a modern creation of ‘the age of bio-power’ where government and society regulate our bodies. Regulation could only occur after the deployment of sexuality, which is what Foucault argues has taken place.

Foucault’s refusal to be categorised by binary hetero / homosexual labels appeals to queer theorists who wish to subvert labels such as ‘gay’, ‘lesbian’, ‘male’ and ‘female’. Whilst he does not address homosexuality in any detail within *The History of Sexuality Volume 1*, the influence of this work on queer theorists has been significant. His commentary on power, knowledge and discourse were at the heart of many of the claims for liberation seen since publication, whilst his claim that sexuality is a construction enabled those outside of the ‘norm’ of heterosexuality to demand equality.

## 1(2) Part one: Introduction

In part one of *The History of Sexuality: Volume One* Foucault reinterprets the generally accepted history of sexuality. He shows that the discourse on sexuality prior to the sexual revolution of the 1960 and beyond is not simply one of repression, and indeed, shows that on

investigation, in many ways the opposite is case. Foucault shows that repression is not completely absent, but that where it is present, repression is a productive form and function of the discourse on sexuality.

## 1(2)(a) 'We Other Victorians'

Foucault begins *The History of Sexuality* by outlining a view that he opposes: '*The Repressive Hypothesis*', the view that society supported, and to a lesser degree perhaps continues to support, a regime where sexuality is restrained and silenced.<sup>2</sup> 'The Repressive Hypothesis' states that until the beginning of the 17<sup>th</sup> Century, sexual discourse was frank and that there was a 'tolerant familiarity with the illicit.'<sup>3</sup> Unlike the 19<sup>th</sup> Century, legal rules regarding indecency and obscenity were lax, discourse was 'shameless' and children, who from this point were desexualised and protected from sexuality, mingled with adults who engaged freely in discourse<sup>4</sup> about sexuality.

What followed was a period where sexuality was restricted to the home, specifically the marital bed, and sexual discourse was muted.<sup>5</sup> The normative locus for sex became the procreative couple<sup>6</sup> and anything that did not conform was silenced and denied existence.<sup>7</sup> This repressive strategy (Foucault does not consider it *prohibitive*)<sup>8</sup> meant that sex became compulsory within marriage,<sup>9</sup> whilst marriage and procreation became compulsory and

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<sup>2</sup> Michel Foucault, *The History of Sexuality Volume One: The Will to Knowledge*, Translated by Robert Hurley (1978) 3

<sup>3</sup> Foucault, *The History of Sexuality* 3

<sup>4</sup> Foucauldian discourse needs to be distinguished from simple discussion. For Foucault discourse is not only dialogue or discussion, but is a broader concept, encompassing concepts of knowledge constitution, power relations, social norms and the subjective relations which attach to power and knowledge. Sexuality, as he will demonstrate is a product of the discourse on power.

<sup>5</sup> Foucault, *The History of Sexuality* 3

<sup>6</sup> Foucault, *The History of Sexuality* 3

<sup>7</sup> Foucault, *The History of Sexuality* 4

<sup>8</sup> Foucault, *The History of Sexuality* 4

<sup>9</sup> Mark G E Kelly, *Foucault's History of Sexuality Volume 1, The Will to Knowledge* (2013), 17

indicative of normality.<sup>10</sup> Bourgeois society of course conceded that there were sexualities that did not conform. These were confined to controlled environments: the brothel and the mental institution, and the clients or patients were, according to Steven Marcus,<sup>11</sup> the ‘other Victorians’. Outside of these environments taboo and repression reigned,<sup>12</sup> and even the advent of Freudian ‘enlightenment’ reinforced the medicalization of non-conforming sexualities, failing to illuminate discourse in any significant way.<sup>13</sup>

By situating the repressive era in the seventeenth century alongside the development of capitalism, repression becomes an ‘integral part of the bourgeois order’.<sup>14</sup> Sex and sexuality become examples of exploitative modes of production, with the liberation of sexuality therefore a revolutionary political cause.<sup>15</sup> Acknowledging the relationship between sex and power as repressive means we appear to be defying established power by discussing it at all.<sup>16</sup> Sexuality is linked to a discourse synonymous with confession and revelation,<sup>17</sup> and subjugation is coupled with a revelatory and revolutionary discourse.<sup>18</sup> It is a mutually reinforcing cycle of repression and revelation<sup>19</sup>.

Foucault intends to investigate our repressive silence, a plight we loudly discuss despite our repressed state.<sup>20</sup> He raises three doubts about the repressive hypothesis: is it an established historical fact; is power repressive; and finally, did the critical discourse that addressed repression challenge or reinforce it by being part of the same repressive

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<sup>10</sup> Foucault, *The History of Sexuality* 4

<sup>11</sup> Foucault, *The History of Sexuality* 4

<sup>12</sup> Foucault, *The History of Sexuality* 5

<sup>13</sup> Foucault, *The History of Sexuality* 5

<sup>14</sup> Foucault, *The History of Sexuality* 5

<sup>15</sup> Foucault, *The History of Sexuality* 6

<sup>16</sup> Foucault, *The History of Sexuality* 6

<sup>17</sup> Foucault, *The History of Sexuality* 7

<sup>18</sup> Foucault, *The History of Sexuality* 7

<sup>19</sup> Foucault, *The History of Sexuality* 7

<sup>20</sup> Foucault, *The History of Sexuality* 7

mechanism?<sup>21</sup> Foucault is not claiming that sexuality has *not* been a taboo subject, but instead intends to ask how and why sexuality has become an object of discussion.<sup>22</sup> In other words, he wishes to know who speaks about sex, what are they saying, what institutions prompt this discourse and what do these institutions do with the discourse produced.<sup>23</sup> Foucault is not claiming that the repressive hypothesis is wrong about the facts, he simply disagrees with it as an *interpretation* of the facts<sup>24</sup> believing that we place too much emphasis on it when accounting for the history of sexuality.<sup>25</sup>

The repressive hypothesis is not totally false, then, but simply inadequate as a single history of sexuality. Its factual existence is questioned by Foucault, but he recognises that, even so, the repressive hypothesis is itself a form of discourse, and our insistence on talking of our repression signifies a desire for knowledge and power. Essentially, Foucault's investigation into sexuality is ultimately an investigation into power and knowledge. More generally, Foucault challenges the perception that repression is the means by which power exerts itself within society; he sees power as productive rather than repressive, and the repressive aspect of sexuality is therefore but one facet of the production.<sup>26</sup>

### 1(3) Part Two: 'The Repressive Hypothesis'

In part two, Foucault expands on his submission that the history of sexuality is not simply one of repression. He does this by revealing the areas of the discursive expansion on sexuality, showing how regulation and control in many ways encourage us to engage in discourse on sexuality, through the religious confessional and the medical and legal professions. He reveals how extra-marital sexual activity was categorised, often as a

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<sup>21</sup> Foucault, *The History of Sexuality* 10

<sup>22</sup> Foucault, *The History of Sexuality* 11

<sup>23</sup> Foucault, *The History of Sexuality* 11

<sup>24</sup> Kelly, *Foucault's History of Sexuality* 28

<sup>25</sup> Kelly, *Foucault's History of Sexuality* 22

<sup>26</sup> Kelly, *Foucault's History of Sexuality* 23

perversion, and for the purposes of prohibition and regulation. Doomed to failure, these regulatory regimes simply produced what they sought to control.

### 1(3)(a) The Incitement to Discourse

Looking back at the period between the 17<sup>th</sup> and 20<sup>th</sup> Centuries, it is clear to Foucault that sexuality was not repressed in the way that the repressive hypothesis would have us believe.<sup>27</sup> Without doubt, the language of sexuality became more discreet,<sup>28</sup> however, from the 18<sup>th</sup> century onwards there was an explosion of discourse<sup>29</sup> particularly amongst those in positions of power.<sup>30</sup>

The thoughts and deeds revealed in the Catholic confessional were the epicentre of the 17<sup>th</sup> Century discursive explosion.<sup>31</sup> Sex was transformed into discourse here.<sup>32</sup> Confessional culture permeated society in the form of scandalous, ‘tell everything’, pornographic literature, converting sex to discourse in a similar way.<sup>33</sup>

Increasing statistical analysis in the 18<sup>th</sup> century saw further categorisation of sex and sexuality. The medical establishment conceded the necessity of examining, and discussing, sex as a perceived requirement of demography.<sup>34</sup> Sexual discourse was necessary so that sex could be managed, utilised, optimised and administered,<sup>35</sup> assisting with economic and political development.<sup>36</sup> During this period discussion of sexuality in front of children was

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<sup>27</sup> Foucault, *The History of Sexuality* 17

<sup>28</sup> Foucault, *The History of Sexuality* 18

<sup>29</sup> Foucault, *The History of Sexuality* 18

<sup>30</sup> Foucault, *The History of Sexuality* 18

<sup>31</sup> Foucault, *The History of Sexuality* 18

<sup>32</sup> Foucault, *The History of Sexuality* 20

<sup>33</sup> Foucault, *The History of Sexuality* 23

<sup>34</sup> Foucault, *The History of Sexuality* 24

<sup>35</sup> Foucault, *The History of Sexuality* 24

<sup>36</sup> Foucault, *The History of Sexuality* 25

restricted,<sup>37</sup> with educational institutions designed to avoid children and adolescents engaging in sexual activity.<sup>38</sup> Discourse surrounding child sexuality was typified by discussion on how childhood sexuality should be banished from everyday discussion with the enforced silence functioning less as the limit of discourse but simply another facet of it.<sup>39</sup> In other words, silence became an element of discourse. Concurrently, medicine, psychiatry and the criminal law also produced their own sexual discourses, indicators of when sex and sexual ‘deviancy’ moved from being ignored to being discussed openly.<sup>40</sup> The generally accepted view that sex was censored is, in fact, the opposite of what occurred. Instead, a mechanism was created to allow for a greater quantity of discourse on sex to take place, particularly by those with power.<sup>41</sup>

Foucault’s main argument is that discourse on sex has increased since the 17<sup>th</sup> Century, although he concedes that how people talk about sex has changed in this time. Confession has evolved into analytics, and this is a direct result of the relationship between power and sex. As sex has become an object of knowledge, its power has increased as it is deployed by the law, medicine and religion.

### 1(3)(b) The Perverse Implantation

It has been argued that the objective of this increased discourse on sex is identifying and controlling non-reproductive sexual activity.<sup>42</sup> Foucault disagrees<sup>43</sup> arguing that sexuality encompasses more than reproductive necessity and that sexual ‘perversion’ has multiplied in this time.

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<sup>37</sup> Foucault, *The History of Sexuality* 27

<sup>38</sup> Foucault, *The History of Sexuality* 27

<sup>39</sup> Foucault, *The History of Sexuality* 27

<sup>40</sup> Kelly, *Foucault’s History of Sexuality* 37

<sup>41</sup> Kelly, *Foucault’s History of Sexuality* 37

<sup>42</sup> Kelly, *Foucault’s History of Sexuality* 39

<sup>43</sup> Foucault, *The History of Sexuality* 37

Until the end of the 18<sup>th</sup> Century, Church and Civil Law governed sexual practices.<sup>44</sup> These codes determined what was acceptable or unacceptable, centred essentially on behaviour *within* marriage. All sex outside of marriage tended to be prohibited but ignored.<sup>45</sup> The discursive exposition of the 18<sup>th</sup> and 19<sup>th</sup> Centuries shifted this focus from marital restrictions to the ‘unnatural’ sexuality of extra-marital sex. Foucault uses *Don Juan*, a fictional uber-promiscuous heterosexual to illustrate his point. Don Juan’s sexual activity is categorised as unnatural and perverted;<sup>46</sup> at the same time the pervert is pathologised and becomes an object for medical or criminal incarceration.<sup>47</sup>

The medicalization of sexuality was universal, allowing increased control,<sup>48</sup> although to do so it was necessary to *produce* sexuality, rather than prohibit it.<sup>49</sup> Rather than categorising and controlling acts, modern forms of control categorised people – prohibited sexual acts became aligned with the nature of the actor.<sup>50</sup> Homosexuality for example, became synonymous with the person: in other words, sexuality suffused the subject’s whole being and he became a ‘homosexual’ rather than ‘a sodomite’ who committed an act that could be punished and corrected.<sup>51</sup>

What homosexuality shared with the other *created* sexualities was that it did not exist prior to this time and was a production of the power trying to suppress perversion, which, in actuality, suppressed nothing and created that which it claimed to oppose.<sup>52</sup> This form of power required discourse to function.<sup>53</sup> The power, instead of creating boundaries, created

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<sup>44</sup> Foucault, *The History of Sexuality* 37

<sup>45</sup> Foucault, *The History of Sexuality* 37

<sup>46</sup> Foucault, *The History of Sexuality* 39

<sup>47</sup> Foucault, *The History of Sexuality* 40

<sup>48</sup> Foucault, *The History of Sexuality* 41

<sup>49</sup> Foucault, *The History of Sexuality* 42

<sup>50</sup> Kelly, *Foucault’s History of Sexuality* 41

<sup>51</sup> Kelly, *Foucault’s History of Sexuality* 41

<sup>52</sup> Kelly, *Foucault’s History of Sexuality* 43

<sup>53</sup> Foucault, *The History of Sexuality* 44

and extended sexuality.<sup>54</sup> Modern industrial society, rather than ushering in an age of increased sexual repression, was one in which unorthodox sexualities exploded.<sup>55</sup> Rather than society silencing prohibited sexual activity, the opposite was in fact true.<sup>56</sup> Increased scrutiny meant that sexual discourse exploded within society.

#### 1(4) Part Three

In part three Foucault explores the difference between the Eastern and Western approach to sex. In the west, he shows how sex was pathologised, categorised and used for the purposes of demographic analysis and control. He demonstrates that this so-called scientific approach when looking at human sexuality has been governed by the prevalent morality of the day – a distinctly unscientific approach in other words. He contrasts this with the Eastern approach to seeking the truth about sex, where truth is sought in the actuality of sex, rather than being subordinated to what is considered right and wrong,

#### 1(4)(a) Scientia Sexualis

Foucault supposes that it will be conceded that there has been an explosion of sexual discourse and that, even with taboos and prohibitions, it has created a sexual multiplicity.<sup>57</sup> He argues however that this was not the intention, and that concealing the true connection of sexuality to moral imperatives was in fact the goal.<sup>58</sup> He argues that until Freud, all scientific discourse on sex was subordinate to moral imperatives, ascribing perversion to the least deviations of sexuality and warning of the dangers to society.<sup>59</sup> Whilst the biological science of animal and botanical reproduction was developed along general scientific rules, the

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<sup>54</sup> Foucault, *The History of Sexuality* 44

<sup>55</sup> Foucault, *The History of Sexuality* 49

<sup>56</sup> Foucault, *The History of Sexuality* 49

<sup>57</sup> Foucault, *The History of Sexuality* 53

<sup>58</sup> Foucault, *The History of Sexuality* 53

<sup>59</sup> Foucault, *The History of Sexuality* 53



science of human sex conformed to different, morality-governed rules.<sup>60</sup> What Foucault believes is important is not the recognition of when we became newly rational about sex, but that we accept that we have inherited some of the blindness of the 19<sup>th</sup> Century in our ongoing search for the truth about sexuality, and that this search for truth is not a new one.<sup>61</sup>

Historically, there have been two methods of producing the truth about sex. In the *ars erotica*, present in Eastern societies, truth is drawn from pleasure itself, rather than in relation to law or utility, with knowledge deflected back into the sexual practice to shape it from within: ‘secrecy’ is utilised only to intensify pleasure.<sup>62</sup> The *ars erotica* is contrastable with Western civilisation where the *scientia sexualis* is practiced – a mechanism for establishing truth as a constituent of power-knowledge.<sup>63</sup> The secrets of *scientia sexualis* are shameful and revealing them an act of confession where the listener, not the speaker, has the power. Foucault is contrasting *sex-as-a-science* against *sex-as-an-art*.

Confession has now become so culturally ingrained that we no longer see it as an effect of constraining power<sup>64</sup> and see it now as a way to seek the truth.<sup>65</sup> The reality is that it is simply encouraged and conditioned by power.<sup>66</sup> Sex becomes something within an unrelenting system of confessions<sup>67</sup> where we are constituted as both passive and active subjects through the process of confession - participation creates a power-relationship, as a confessor is required.<sup>68</sup> It is through confession that *scientia sexualis* has developed and it remains the mechanism by which truth is discursively produced about sex, as we have been conditioned to believe it is liberating.

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<sup>60</sup> Foucault, *The History of Sexuality* 54

<sup>61</sup> Foucault, *The History of Sexuality* 57

<sup>62</sup> Foucault, *The History of Sexuality* 57

<sup>63</sup> Foucault, *The History of Sexuality* 58

<sup>64</sup> Foucault, *The History of Sexuality* 60

<sup>65</sup> Foucault, *The History of Sexuality* 60

<sup>66</sup> Kelly, *Foucault's History of Sexuality* 49

<sup>67</sup> Foucault, *The History of Sexuality* 61

<sup>68</sup> Foucault, *The History of Sexuality* 61

## 1(5) Part Four: The Deployment of Sexuality

Part four of *The History of Sexuality: Volume One* is specifically about power and its relation to sexuality. Foucault shows that power is omnidirectional and in many ways rises from below, rather than being a restrictive power wielded from above. He shows that power is not a constraint on sex, but is rather inherent to sexuality; furthermore, he reveals that sexuality is not natural at all, but is instead a social construction and a crossroads of power relations. It has not, as has been assumed by many, been repressed for social and economic reasons, but rather, it has been produced for these self-same reasons.

### 1(5)(a) Chapter 1: Objective

Foucault wishes to determine why we place such emphasis on sexuality and why we believe knowledge and truth on the subject will liberate us. He is not alone in arguing that sex is not repressed: psychoanalysts have taken the position that power and desire are interlinked in a way that cannot be characterised as prohibition versus rebellion.<sup>69</sup> Power creates both desire and its absence. In other words, desire only exists when there is a repressive power constraining us.<sup>70</sup>

Foucault criticises this conception of power as *juridico-discursive* and he intends to liberate power from this characterisation which he identifies as always being repressive, taking the form of law.<sup>71</sup> In this model, sex is always something that power constrains and there is therefore always a negative relationship between power and sex. Power determines

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<sup>69</sup> Foucault, *The History of Sexuality* 81

<sup>70</sup> Foucault, *The History of Sexuality* 82

<sup>71</sup> Foucault, *The History of Sexuality* 86

how sex is treated, understood, suppressed and prohibited. In this model, power is seen as being exercised in the same way at all levels.<sup>72</sup>

This inadequate characterisation of power is accepted by us because we would find the true face of power unacceptable.<sup>73</sup> We can accept prohibitive power but not ‘generative’ power<sup>74</sup> largely because our conception of power is monarchical.<sup>75</sup> The juridico-discursive model is traced to the middle ages when law became equated with power. The juridical representation of power is present in the analysis of power to sex<sup>76</sup> leading us to believe both the repressive hypothesis and the restrictive characterisation of power.<sup>77</sup>

#### 1(5)(b) Chapter 2: Method

Foucault’s intention is to analyse sex in terms of power, understood as an omnidirectional force, inherent within everything.<sup>78</sup> Everything is conditioned by power because power emanates from everybody and everything.<sup>79</sup> Power is not a person, not an institution and is not a ‘strength’ we can obtain or be endowed with and should be understood as a relational situation within society.<sup>80</sup> Whilst the position a person holds may have power, this does not make the person powerful as the power sits with the position, not the holder.<sup>81</sup> In other words, we are all affected by power, and we all generate power.

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<sup>72</sup> Foucault, *The History of Sexuality* 84

<sup>73</sup> Foucault, *The History of Sexuality* 86

<sup>74</sup> Foucault, *The History of Sexuality* 86

<sup>75</sup> Foucault, *The History of Sexuality* 86

<sup>76</sup> Foucault, *The History of Sexuality* 89

<sup>77</sup> Kelly, *Foucault’s History of Sexuality* 61

<sup>78</sup> Foucault, *The History of Sexuality* 92

<sup>79</sup> Foucault, *The History of Sexuality* 92

<sup>80</sup> Foucault, *The History of Sexuality* 92

<sup>81</sup> Foucault, *The History of Sexuality* 94

The effects of power do not issue from above, instead, radiating from below.<sup>82</sup> Power relationships are intentional, their effects calculated and their aims defined, although it is rarely the case that a single actor or institution has articulated the calculus and objectives.<sup>83</sup> Power creates resistance, an internal component of power rather than an external force<sup>84</sup> and like power, resistance has no central nexus or identifiable actor or institution; power is therefore inescapable.<sup>85</sup> The consequence of this conception of power is that sex and sexuality cannot have been produced from some powerful agency and we must therefore ask how it has been produced from below.<sup>86</sup> It is notable that power has *produced*, rather than restricted sex and sexuality so we must enquire how power relations affected the production of discourse on sex.<sup>87</sup>

It is not possible to have knowledge of sexuality, or to enquire into sexuality, without the presence of power. Foucault calls this '*the rule of imminence*' meaning that power is inherent to sexuality.<sup>88</sup> Power continually changes and it is therefore pointless to seek the person wielding or deprived of it; this '*rule of continual variation*' means that we should instead seek out the transformative matrices of relations of power-knowledge.<sup>89</sup> The '*rule of double conditioning*' means that the individual and the collective are both dependent on each other and neither would be fully actualised without the other.<sup>90</sup> Finally, discourse on sexuality, or any other area, should not be viewed as self-contained. The rule of the '*tactical*

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<sup>82</sup> Foucault, *The History of Sexuality* 94

<sup>83</sup> Foucault, *The History of Sexuality* 95

<sup>84</sup> Foucault, *The History of Sexuality* 95

<sup>85</sup> Foucault, *The History of Sexuality* 96

<sup>86</sup> Kelly, *Foucault's History of Sexuality* 75

<sup>87</sup> Foucault, *The History of Sexuality* 98

<sup>88</sup> Foucault, *The History of Sexuality* 98

<sup>89</sup> Foucault, *The History of Sexuality* 99

<sup>90</sup> Foucault, *The History of Sexuality* 99

*polyvalence of discourse*’ means that it can be combined with other discourses to suit the tactical situation of deployment.<sup>91</sup>

#### 1(5)(c) Chapter 3: Domain

Sexuality is not an entity repressed by power or discovered by investigation.<sup>92</sup> Sexuality is a social construct and a junction of power relations.<sup>93</sup> Our concept of sexuality is gleaned from how we use it and how useful it is to us – how it is deployed by us and against us.<sup>94</sup>

Beginning in the 18<sup>th</sup> Century, there were four strategic unities that formed specific mechanisms of knowledge and power about sex.<sup>95</sup> Firstly, *‘a hysterization of women’s bodies’* – essentially that women’s bodies are particularly sexual when compared with men’s, pathologising their sexuality and focusing on their reproductive responsibilities; women’s bodies became an object of medical knowledge.<sup>96</sup> Secondly, *a pedagogization of children’s sex* – a paradoxical assertion that children are naturally prone to indulge in sexual activity whilst deeming it absolutely inappropriate.<sup>97</sup> Thirdly, *a socialization of procreative behaviour* – reproduction became the concern of society and therefore politicised and ‘managed’.<sup>98</sup> Finally, *the psychiatrization of perverse pleasure* – sexuality was categorised as biological and psychological and was assigned normalised behaviour on the one hand and pathologised behaviour to be corrected on the other.<sup>99</sup>

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<sup>91</sup> Foucault, *The History of Sexuality* 100

<sup>92</sup> Kelly, *Foucault’s History of Sexuality* 77

<sup>93</sup> Foucault, *The History of Sexuality* 103

<sup>94</sup> Foucault, *The History of Sexuality* 103

<sup>95</sup> Foucault, *The History of Sexuality* 103

<sup>96</sup> Foucault, *The History of Sexuality* 104

<sup>97</sup> Foucault, *The History of Sexuality* 104

<sup>98</sup> Foucault, *The History of Sexuality* 105

<sup>99</sup> Foucault, *The History of Sexuality* 105

These strategies *produced* sexuality,<sup>100</sup> not a natural phenomenon repressed by power<sup>101</sup> but instead a social device<sup>102</sup> contrastable with the device of alliance, a system of managing heterosexual marriage and reproduction, existent in almost every culture.<sup>103</sup> Whilst the locus of both sexuality and alliance is the family, the significance of alliance has decreased since the importance of sexuality has increased.<sup>104</sup> Sexuality evolved from alliance and the rules of alliance informed what was permissible when creating sexuality.

Sexuality was extra-familial<sup>105</sup> before being absorbed by the family<sup>106</sup> to support alliance.<sup>107</sup> The conflicts between alliance and sexuality became problematic. Family, the core of alliance, was the locus of all of the problems of sexuality.<sup>108</sup> From the mid-19<sup>th</sup> century the family purged itself of intra-familial sexuality,<sup>109</sup> resulting in the incest taboo.<sup>110</sup> Sexuality was deployed, meaning it was used to embed, control and create mechanisms of power. Alliance could not be deployed so successfully as it focused only on marital sex and exogamic heterosexuality - sexuality, on the other hand, could be deployed throughout the whole of society, particularly when coupled with alliance.<sup>111</sup> We cannot therefore adequately categorise the history of sex as one in which sexuality was repressed for political or economic reasons; sex was *deployed* for these very reasons.<sup>112</sup>

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<sup>100</sup> Foucault, *The History of Sexuality* 105

<sup>101</sup> Foucault, *The History of Sexuality* 105

<sup>102</sup> Foucault, *The History of Sexuality* 105

<sup>103</sup> Foucault, *The History of Sexuality* 106

<sup>104</sup> Foucault, *The History of Sexuality* 108

<sup>105</sup> Foucault, *The History of Sexuality* 110

<sup>106</sup> Foucault, *The History of Sexuality* 110

<sup>107</sup> Foucault, *The History of Sexuality* 111

<sup>108</sup> Foucault, *The History of Sexuality* 111

<sup>109</sup> Foucault, *The History of Sexuality* 111

<sup>110</sup> Kelly, *Foucault's History of Sexuality* 81

<sup>111</sup> Foucault, *The History of Sexuality* 113

<sup>112</sup> Foucault, *The History of Sexuality* 114

If we read the history of sexuality as one of repression, two fractures appear.<sup>113</sup> The first is the 17<sup>th</sup> century restriction of sexuality to marriage;<sup>114</sup> the second, the sexual revolution of the mid-twentieth century.<sup>115</sup> Foucault intends to disprove this repressive view by tracing the chronology of sexuality,<sup>116</sup> from its roots in the Christian confessional<sup>117</sup> via the 18<sup>th</sup> Century entrenchment in state institutions,<sup>118</sup> focusing on pedagogy, the medicine of the female sexual physiology, and the demography of birth statistics coupled with the prohibition on contraception.<sup>119</sup> These axes also relate to the four strategies detailed earlier.

The Christian roots of the axes were transformed from death and damnation into pathology and illness.<sup>120</sup> Sex was separated from anatomical medicine with sexual abnormality indicative of sexual pathology demonstrable through sexual behaviour.<sup>121</sup> Concurrently, heredity placed sex in a position of biological responsibility assuming that sex could be affected by its own diseases afflicting future generations.<sup>122</sup> This theory of ‘degenerescence’ concluded that heredity, burdened with disease, *produced* a sexual pervert;<sup>123</sup> in other words, bad breeding resulted in defective offspring. Degenerescence formed the core of the new technologies of sex, underpinning psychiatry, jurisprudence, legal medicine, social control and child protection.<sup>124</sup> Modern psychiatry ultimately made

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<sup>113</sup> Foucault, *The History of Sexuality* 115

<sup>114</sup> Foucault, *The History of Sexuality* 115

<sup>115</sup> Foucault, *The History of Sexuality* 115

<sup>116</sup> Foucault, *The History of Sexuality* 115

<sup>117</sup> Foucault, *The History of Sexuality* 116

<sup>118</sup> Foucault, *The History of Sexuality* 116

<sup>119</sup> Foucault, *The History of Sexuality* 117

<sup>120</sup> Foucault, *The History of Sexuality* 117

<sup>121</sup> Foucault, *The History of Sexuality* 117

<sup>122</sup> Foucault, *The History of Sexuality* 118

<sup>123</sup> Foucault, *The History of Sexuality* 118

<sup>124</sup> Foucault, *The History of Sexuality* 119

degenerescence obsolete. This chronology, dominated by confessional techniques and the growth of psychiatry is less a history of repression and more a history of invention.<sup>125</sup>

If repression were related to the utilization of labour capacity, as the repressive hypothesis states, repressive techniques would be applied most acutely to the poorer classes and to the young adult male.<sup>126</sup> This, however, is the opposite of what occurred, despite Marxist suppositions.<sup>127</sup> The same can be said for the family as an agency of control – it was in the bourgeois family that women were first hysterised and children desexualised as only they, and the nobility, could afford medical interventions or psychiatry; the same classes were the regular attendees of confession.<sup>128</sup> Sexual repression was created to distinguish the sexual activities of the bourgeoisie from the working classes, however, they did so by placing constraints upon themselves.

The working classes initially escaped the deployment of sexuality, and when eventually caught within its net they were reeled in in three successive waves - the discovery and prohibition of working class birth control;<sup>129</sup> the family deployed as an instrument of political and economic control<sup>130</sup> and, finally, the legal control of perversion as necessary for the protection of society and the human race.<sup>131</sup> It was only then, when the deployment of sexuality was maximised, that it spread through the entire social body.<sup>132</sup> Sexual *repression* was not the tool of the bourgeoisie, but sexuality was.<sup>133</sup>

It is clear here that Foucault interprets the history of sexuality as one in which class dominance played a role. Sexuality is an invention, created for the propagation of the

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<sup>125</sup> Kelly, *Foucault's History of Sexuality* 87

<sup>126</sup> Foucault, *The History of Sexuality* 120

<sup>127</sup> Foucault, *The History of Sexuality* 120

<sup>128</sup> Kelly, *Foucault's History of Sexuality* 87

<sup>129</sup> Foucault, *The History of Sexuality* 121

<sup>130</sup> Foucault, *The History of Sexuality* 122

<sup>131</sup> Foucault, *The History of Sexuality* 122

<sup>132</sup> Foucault, *The History of Sexuality* 122

<sup>133</sup> Foucault, *The History of Sexuality* 122



bourgeoisie. Having dismissed the juridico-discursive model of power for one which is omnidirectional, along with identifying that sexuality is a social construction and locus of many power relationships, he demonstrates this by showing how the bourgeoisie created what it commonly thought of today as 'sexuality'. Sexuality then is not, as the repressive hypothesis proposes, outside of power and controlled by it, but is instead a mechanism to channel power.

#### 1(6) Part Five

In part five, Foucault introduces his concept of Bio-Power, the method by which the state regulates and subjugates our bodies for the purposes of control. Bio-power manages this through the discipline of the body and by population regulation. This power is exercised through sex, which, rather than being viewed as a function of our body parts, is actually also exposed as a social construction, something which is linked to a number of social and political contexts. Sex is something which we discuss less in a functional way, and more as a relational aspect to many other considerations in our lives. It is conditioned by power, created by it, and it is impossible to step outside of it. Sex as we understand it today does not exist outside of sexuality and is simply a created concept that enables us to engage with the various discourses on sexuality.

#### 1(6)(a) Right of Death and Power Over Life.

The absolute right of the Sovereign to decide life and death has diminished over time.<sup>134</sup>

Transforming initially into a power to expose a subject to potential death in war or permit the

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<sup>134</sup> Foucault, *The History of Sexuality* 135

execution of criminals,<sup>135</sup> essentially a power of seizure,<sup>136</sup> the power now manifests itself as a power to maintain and develop life.<sup>137</sup> The power to take life or let live has been replaced by a power to foster life or disallow it to the point of death.<sup>138</sup>

Starting in the 17<sup>th</sup> Century, the power over life evolved in two ways. The first, an anatomo-politics of the human body, centred on the body as a machine to be optimised, disciplined, utilised and integrated into economic and efficiency systems.<sup>139</sup> Institutions such as schools, hospitals, universities and factories emerged to comprise this first pole of evolution.<sup>140</sup> The second pole focused on the body as a biological organism for reproduction and the maximisation of life expectancy through health and mortality; this was a bio-politics of the population<sup>141</sup> comprising of observation, statistics and interventions.<sup>142</sup>

These disciplines constituted a bipolar technology of the body, a power whose function was no longer to take life, but to maximise it.<sup>143</sup> Capitalism would have been impossible without these disciplines with bio-politics creating a healthy workforce and anatomo-politics necessary to create industrial production.<sup>144</sup> Resistance to bio-power whilst ubiquitous demands the right to life, over the body, to health; it seeks inclusion in the protection of bio-power, rather than its abolition.<sup>145</sup>

Sovereign power is not obliterated by bio-power; instead, power takes on a dual purpose, repressive and nurturing.<sup>146</sup> Law is diminished as bio-power partially replaced it

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<sup>135</sup> Foucault, *The History of Sexuality* 135

<sup>136</sup> Foucault, *The History of Sexuality* 136

<sup>137</sup> Foucault, *The History of Sexuality* 136

<sup>138</sup> Foucault, *The History of Sexuality* 138

<sup>139</sup> Foucault, *The History of Sexuality* 138

<sup>140</sup> Foucault, *The History of Sexuality* 140

<sup>141</sup> Foucault, *The History of Sexuality* 139

<sup>142</sup> Foucault, *The History of Sexuality* 140

<sup>143</sup> Foucault, *The History of Sexuality* 140

<sup>144</sup> Foucault, *The History of Sexuality* 141

<sup>145</sup> Kelly, *Foucault's History of Sexuality* 101

<sup>146</sup> Kelly, *Foucault's History of Sexuality* 101

with ‘the norm’<sup>147</sup> and, bound to enforcement via the binary of right and wrong, it is contrastable with bio-power which is not as concerned with separating the licit from the illicit.<sup>148</sup> Law is brought into the bio-power process of graded measurement, and comes to operate itself as a norm and judicial institutions are incorporated into a continuum of apparatuses.<sup>149</sup> Sex was at the centre of both axes along which developed the political technology of life; this is why it assumed such importance, tied as it was to both the disciplines of the body and the regulation of populations.<sup>150</sup> This is also why, in the 19<sup>th</sup> Century, the smallest details of sexuality were sought out.<sup>151</sup>

Foucault’s fixation on history could see him accused of failing to notice sexuality, discoverable via psychology and physiology, rather than history.<sup>152</sup> He claims that an analysis of sexuality does not necessarily imply a merging of body, anatomy, biology and function<sup>153</sup> and that discussing sexuality without reference to biology does not imply a rejection of biological facts.<sup>154</sup> He is not reciting a history of how people thought, but instead is articulating a history of bodies - a history of what occurred at a material level.

Is it possible to narrate the history of sexuality without questioning sex?<sup>155</sup> Foucault is dubious of the very notion of sex, believing it to be an idea formed across different power strategies,<sup>156</sup> an entity born of sexuality.<sup>157</sup> Sex is more than bodies, organs and sensations and has properties of its own<sup>158</sup> and the strategies he enumerated demonstrate that the

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<sup>147</sup> Foucault, *The History of Sexuality* 144

<sup>148</sup> Kelly, *Foucault’s History of Sexuality* 102

<sup>149</sup> Foucault, *The History of Sexuality* 144

<sup>150</sup> Foucault, *The History of Sexuality* 145

<sup>151</sup> Foucault, *The History of Sexuality* 146

<sup>152</sup> Kelly, *Foucault’s History of Sexuality* 109

<sup>153</sup> Foucault, *The History of Sexuality* 151

<sup>154</sup> Kelly, *Foucault’s History of Sexuality* 110

<sup>155</sup> Foucault, *The History of Sexuality* 152

<sup>156</sup> Kelly, *Foucault’s History of Sexuality* 111

<sup>157</sup> Foucault, *The History of Sexuality* 152

<sup>158</sup> Foucault, *The History of Sexuality* 153

artificial unity of biology, body, pleasure and utility are essentially politically expedient<sup>159</sup> and quasi-scientific.<sup>160</sup> Sex made it possible to invert the relationship of power to sexuality, making sexuality something rooted in an urgent irreducibility which power tries to dominate; sex allows us to evade what empowers power.<sup>161</sup> Sex then is not an autonomous agent, but is instead an element of the deployment of sexuality.<sup>162</sup> However, sex is not the agent of sexuality - if anything, sex is subordinate to sexuality. Sexuality is a historic formation and is, in fact, what gave rise to the notion of sex as its object.<sup>163</sup> It is through sex that everyone understands himself, his body and his identity.<sup>164</sup>

### 1(7) Conclusions for Queer Theory

Foucault's *The History of Sexuality: Volume One* is significant to queer theorists for a number of reasons. By revealing that the history of sexuality was not simply one of repression, Foucault shows that the controlling mechanisms deployed since the 17<sup>th</sup> Century, up to and including the sexual revolution of the 1960s, were simply deployments of a discourse on sexuality. The purpose of this discourse was less the exposure of the naturalness of heterosexuality and more the creation of a normative basis for heterosexuality aligned with the need to manage and control the subject. Homosexuality was created as an object of knowledge to allow this to take place, but in doing so, homosexuality was imbued with a power of its own. Heterosexuality, whilst also created, was, in many, less an object of knowledge as it was presented as a natural phenomenon in need of no investigation, no confession and absolution, and not subject to the criminal law.

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<sup>159</sup> Kelly, *Foucault's History of Sexuality* 112

<sup>160</sup> Foucault, *The History of Sexuality* 155

<sup>161</sup> Foucault, *The History of Sexuality* 155

<sup>162</sup> Foucault, *The History of Sexuality* 155

<sup>163</sup> Foucault, *The History of Sexuality* 157

<sup>164</sup> Foucault, *The History of Sexuality* 156

The exposure of the artificiality of sexuality allows for alternative positions to be articulated, positions that argue that sexual acts are not definitional and that heterosexuality is no more natural than homosexuality. By pathologising homosexuality and creating discourse and knowledge about it, a 'reverse discourse' was also created.<sup>165</sup> Homosexuals began to speak on their own behalf, using the same vocabulary and categories, and demanding that their 'naturalness' be acknowledged.<sup>166</sup> In many ways, the sexual identity politics that followed was a development of Foucault's work.

What Foucault has identified is that sexuality is a product of the evolution of the discourses on the subject of sexuality, rather than an exposition of the facts of the matter obtained through objective observation. Indeed, Foucault claims that objectivity has, at some points, been singularly absent when discourse on sexuality has been produced. The science of sexuality, or *scientia sexualis*, was a development of discursive practice; when the subject of this observation is located in the shifting grounds of the subjective reality of discourse, there can be no stable subject, or object, of study.

In articulating the age of bio-power, Foucault shows how sexuality has been deployed as a mechanism of control. Homosexuality was created as a negative sexuality to reinforce the positivity of heterosexuality. This artificial binarism articulates two categories: heterosexuality, the unproblematic default category to which everyone is presumed to belong; and homosexuality, a problematized category which is designated as an aberration. Foucault shows that the problematic categorisation of homosexuality exists simply to allow for the existence of heterosexuality in an unproblematic state. Heterosexuality is defined by its normality, but for this to be so, abnormality has to be created. Homosexuality is therefore a relational category rather than a true, objectively observed status. As heterosexuality is a

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<sup>165</sup> Foucault, *The History of Sexuality* 101

<sup>166</sup> Tasmin Spargo, *Foucault and Queer Theory*, Icon Books UK, (Cambridge, 1999) 22

category with a privileged status, homosexuality is therefore a category of disadvantage; the bio-power discourse becomes pervasive and self-policing in an attempt to ensure that subjects are not exiled from the privileged class.<sup>167</sup>

Foucault's overall model of discourse, power and knowledge was useful in providing a base to challenge not just heteronormativity, but also in countering homonormativity - that is, that there is an acceptable model of the gay man or lesbian. The homonormative model simply excludes other groups who do not conform to the artificial hetero-homo binary and it is evident throughout *The History of Sexuality: Volume One* that these binaries have been created with the purpose of regulation and control without any basis in naturality. All sexualities, be they culturally acceptable or not, have the same creator, and that creator is the discourse on sexuality. The revelation that sexuality is a product of discourse allows for strategies of confrontation and resistance to be devised.

*The History of Sexuality: Volume One* challenges, in many ways, the very core of our understanding of the concept of 'self'. Sexuality has become a fundamental concept that defines a person. Foucault exposes that this 'self-definition' cannot be viewed autonomously, and that it is, instead, a product of collectivity, of discourse, and of power relations. Sexual identity, whatever form that may take, is not natural, and is as illusory as other attributes that we presume to be foundational. Gender is another of these presumed foundational attributes, and it is to gender that the next chapter turns in the review of *Gender Trouble* by Judith Butler. Butler develops Foucault's work on sexuality by examining feminist theories of gender using the same poststructuralist approach. As will be shown, she demonstrates that gender is simply a production of the same discourse that produced sexuality.

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<sup>167</sup> David M Halperin, *Saint Foucault: Towards a Gay Hagiography*, Oxford University Press, (Oxford, 1995) 18

## 2 Gender Trouble by Judith Butler

### 2(1) Introduction

Judith Butler's *Gender Trouble* is a further foundational text for queer theorists. Whereas Foucault focused on power, showing how it created sexuality for the purposes of regulation and control, Butler focuses on imposed universality and gender performativity. Some feminists noted that Foucault's study had focused almost exclusively on male homosexuality when exploring the 'deviant'.<sup>168</sup> In *Gender Trouble*, Butler shows that gender, like sexuality, is a performative effect, a social construction.

She firstly exposes that gender universality, uncritically and un-controversially accepted as the norm, is, in fact, a fiction which takes no account of cultural specifics when considering the patriarchy. The feminist need for a universal feminine subject around which to coalesce is revealed to be a fiction that simply reinforces the gender binary, despite its seeming inseparability from identity and identity politics.

Butler examines the gender investigations of anthropologists and psychiatrists, showing again that gender is in fact relational, understood only within a heterosexual framework. The anthropological foundations upon which gender identity is constructed are, at best, unstable. The psychological examinations focus on the resolution of the Oedipal / incest taboo, and here, Butler exposes that homosexuality and polymorphism are, in fact, foundational, whereas heterosexuality is a product of the resolution of this conflict.

Finally, Butler shows that gender is simply a performative concept, but one in which we are unable to refuse to participate. We cannot stand outside of gender, regardless of

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<sup>168</sup> Tasmin Spargo, *Foucault and Queer Theory*, Icon Books, (Cambridge, 1999) 52

whether refusals to participate in the binary are voluntary or arise through biological reality. She shows, by utilising drag, that performance is simply all that gender is, and in doing so, sets gender free.

## 2(2) Chapter 1: Introduction

In chapter one, Butler challenges the notion that women are a singular category, capable of representation. She questions the universality of the feminine subject and exposes the artificiality of gender and sex, both binary creations of the same discourse identified as oppressive in feminist theory. Whilst Butler accepts that it is not possible to step outside of the existing power matrix, she identifies positive opportunities in departing from foundationalism.

### 2(2)(a) Subjects of Sex/Gender/Desire

Is it possible to categorise ‘women’ as universal subjects, in the the way that feminist theory has sought to?<sup>169</sup> If, as Foucault identifies, juridical systems of power produce the subjects they come to represent,<sup>170</sup> prohibition, regulation and controlling systems will produce that which they seek to prohibit, control and regulate. The feminist subject is therefore reproduced by a system that requires her for its existence and it is therefore unlikely to be a system which emancipates her.<sup>171</sup> It is possible that, on investigation, ‘women’ may be incapable of representation as the universal identity we have ascribed to them may be a social construct of the system of control.<sup>172</sup>

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<sup>169</sup> Judith Butler, *Gender Trouble* (Second Edition) Routledge (London, 1999) 3

<sup>170</sup> Butler, *Gender Trouble* 4

<sup>171</sup> Butler, *Gender Trouble* 4

<sup>172</sup> Butler, *Gender Trouble* 5



The political assumption that there is a universally oppressed feminist subject has been criticised for failing to account for culturally-contextual gender oppression; in other words, the assumption only acknowledges that which supports the theory of universality. This criticism has undermined a theory of universal patriarchal domination<sup>173</sup> although the perceived universality of the female subject has proven to be more robust.<sup>174</sup> Butler suggests that

*‘the presumed universality and unity of the subject of feminism is effectively undermined by the constraints of the representational discourse in which it functions. Indeed, the premature insistence on the stable subject of feminism, understood as a seamless category of women inevitably generates multiple refusals to reject the category’*<sup>175</sup>

Butler’s assertion is that feminism undermines itself by insisting that women are a cohesive group with an identical agenda: this assertion fails to account for the fact that the category ‘woman’ is a product of discourse, or from the production of what Foucault would call ‘reverse-discourse’.<sup>176</sup> Universality in the feminist context is coercive and misrepresentative<sup>177</sup> and understandable only in the male / female heterosexual matrix. Feminism needs to be reproduced to be reflective of this.<sup>178</sup>

If we accept sex as an anatomical fact, and gender as a cultural imposition, then one cannot be said to necessarily follow the other; it does not follow that the construction of ‘men’ will fall only to males, and ‘women’ to females. The presumption of a binary system

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<sup>173</sup> Butler, *Gender Trouble* 7

<sup>174</sup> Butler, *Gender Trouble* 7

<sup>175</sup> Butler, *Gender Trouble* 7

<sup>176</sup> Foucault, *The History of Sexuality*, 101

<sup>177</sup> Butler, *Gender Trouble* 8

<sup>178</sup> Butler, *Gender Trouble* 8

implicitly supports the relation of gender to sex, one mirroring, or restricting the other.<sup>179</sup> We must ask how our given sex or gender was ‘given’ in the first place. Butler suggests that indeed sex is simply a gendered category, produced by gender and therefore artificial.<sup>180</sup> Having a gender infers possession, which in itself infers acquisition, whereas being a gender infers an element of assumption and interpretation. If gender is a cultural interpretation of sex, what is the mechanism of construction and how do we become it? Could it be constructed differently or is it socially determined, foreclosing agency or transformation? Is it acquired or imposed?<sup>181</sup>

Simone de Beauvoir<sup>182</sup> suggests that ‘*one is not born a woman, but, rather, becomes one*’<sup>183</sup> implying both construction and agency,<sup>184</sup> and also implying that one could appropriate whatever gender one chose.<sup>185</sup> Butler proposes that whether gender is fixed, or chosen, it is a function of a discourse which limits analysis of gender by presupposing certain aspects of humanity rooted in binarism.<sup>186</sup> Gender, for Butler, is as artificial as sex. It is a binary differentiating characteristic as well as an analytical fact. This relational aspect of gender, it has been argued, is in fact all that gender is; it is not an individual attribute, and for some, only the female gender is differentiated, with the male a genderless default.<sup>187</sup>

The universality of both the category ‘women’ and masculine oppression is questioned in contemporary feminist debates as normative and exclusionary.<sup>188</sup> It is assumed that coalition requires solidarity at any cost as a pre-requisite for political action.<sup>189</sup> Butler is

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<sup>179</sup> Butler, *Gender Trouble* 10

<sup>180</sup> Butler, *Gender Trouble* 11

<sup>181</sup> Butler, *Gender Trouble* 11

<sup>182</sup> Simone de Beauvoir, *The Second Sex*, trans. E.M. Parshley, Vintage, (New York, 1973)

<sup>183</sup> Butler, *Gender Trouble* 12

<sup>184</sup> Butler, *Gender Trouble* 12

<sup>185</sup> Butler, *Gender Trouble* 13

<sup>186</sup> Butler, *Gender Trouble* 13

<sup>187</sup> Butler, *Gender Trouble* 18

<sup>188</sup> Butler, *Gender Trouble* 19

<sup>189</sup> Butler, *Gender Trouble* 20

unsympathetic to this approach and believes that departing from foundationalism could encourage inclusion,<sup>190</sup> whilst discouraging conformance with pre-set identities.<sup>191</sup> This more inclusive approach would also acknowledge the artificiality of the category 'women' and concede that 'women' occupy differing positions of power.<sup>192</sup>

If we only understand personhood via the binary of male/female, is it even possible to separate gender and identity? Isn't our conception of gender and identity simply shaped by the regulatory practices that for Foucault, produce the truth about sex? The determinist approach to sexuality and gender assumes that everyone is heterosexual. This requires the binarism of male and female as expressions of feminine and masculine and anything not in conformance with this is denied existence. However, this denial simply creates that which it aims to exterminate and ultimately reveals the limits of regulation.

The destruction of the category of sex would eliminate what is essentially an attribute that has come to take the place of the person.<sup>193</sup> Butler concludes, using the example of hermaphroditism, that 'there is no gender identity... [and] that identity is performatively constituted'.<sup>194</sup> This being the case, and the construction being a production of the existing power matrix, there is no before, outside, or beyond gender or sexuality, and it must be reconstructed within the existing power matrix.<sup>195</sup>

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<sup>190</sup> Butler, *Gender Trouble* 21

<sup>191</sup> Butler, *Gender Trouble* 22

<sup>192</sup> Butler, *Gender Trouble* 22

<sup>193</sup> Butler, *Gender Trouble* 27

<sup>194</sup> Butler, *Gender Trouble* 32

<sup>195</sup> Butler, *Gender Trouble* 40

## 2(3) Chapter 2: Prohibition, Psychoanalysis and the Production of the Heterosexual Matrix.

Feminist theory has looked to a pre-patriarchal era to situate a critique of the history of women's oppression.<sup>196</sup> This has caused debates about whether there *was* a pre-patriarchal culture, essentially seeking a beginning of the patriarchy to infer that there can also be an end. In doing so, however, the notion of 'patriarchy' threatens to impose a cultural homogeneity<sup>197</sup> which legitimates the legal system of control which produced it. For Butler, this is politically problematic.<sup>198</sup> Butler questions whether those who try to locate the commencement of the gender hierarchy rely on pre-suppositional fictions with problematic norms.<sup>199</sup> Chapter two is essentially a complex review of psychoanalytic and anthropological theories of sex and gender which contribute to Butler's argument that universality is fictional, gender is relational and identity performative.

### 2(3)(a) Structuralism's Critical Exchange.

Butler begins her review by looking at the work of Claude Lévi-Strauss, who claims that all systems of kinship are characterised by a system of exchange where women are the currency.<sup>200</sup> In *The Elementary Structures of Kinship*<sup>201</sup> he claims that the bride both facilitates trade and consolidates bonds between men.<sup>202</sup> Women have no identity and instead reflect the masculinity<sup>203</sup> that uses them as bills of exchange to differentiate and bind the

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<sup>196</sup> Butler, *Gender Trouble* 45

<sup>197</sup> Butler, *Gender Trouble* 46

<sup>198</sup> Butler, *Gender Trouble* 46

<sup>199</sup> Butler, *Gender Trouble* 47

<sup>200</sup> Butler, *Gender Trouble* 49

<sup>201</sup> Claude Lévi-Strauss, *The Principles of Kinship* in *The Elementary Structures of Kinship*, Beacon Press, (Boston, 1969)

<sup>202</sup> Butler, *Gender Trouble* 50

<sup>203</sup> Butler, *Gender Trouble* 50

homosocial<sup>204</sup> masculine identity.<sup>205</sup> Lévi-Strauss links the masculine identity to the incest taboo which bars the son from a sexual relationship with the mother, creating a kinship relationship between them instead. The incest taboo bars the daughter from both the father and mother, forcing maternity upon her to perpetuate this kinship.<sup>206</sup> Lévi-Strauss claims that the taboo generates exogamic heterosexuality upon the rejection of the parent as a sexual object.<sup>207</sup>

For Butler, Lévi-Strauss' universal masculine sexual agency and heterosexuality are the foundational fictions on which he constructs his theory, but is unable to account for.<sup>208</sup> She questions the universality of the subordinate identity of women as well as the exchange economy that is at the core of his theory.<sup>209</sup> Further, she identifies that there is an identity-in-difference between the men making the exchange<sup>210</sup> but nothing that indicates what mechanisms differentiate the sexes.<sup>211</sup> The relational aspect of gender that Butler identifies is unstated when applied to this exchange economy: it is pre-supposed, but exists only between men.<sup>212</sup> Levi-Straus explains this presupposition by stating that women *must have been* required to become objects of exchange.<sup>213</sup> Butler dismisses this as anthropologically undocumented, but if true it simply proves that gender is performative as women have *had to become* something that they were not to begin with.<sup>214</sup> Finally, Butler rejects the incest taboo, the apparent birthplace of male heterosexual desire, as Levi-Straus is unable to identify

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<sup>204</sup> Butler, *Gender Trouble* 52

<sup>205</sup> Butler, *Gender Trouble* 52

<sup>206</sup> Butler, *Gender Trouble* 37

<sup>207</sup> Butler, *Gender Trouble* 52

<sup>208</sup> Butler, *Gender Trouble* 53

<sup>209</sup> Butler, *Gender Trouble* 52

<sup>210</sup> Butler, *Gender Trouble* 52

<sup>211</sup> Butler, *Gender Trouble* 52

<sup>212</sup> Butler, *Gender Trouble* 52

<sup>213</sup> Butler, *Gender Trouble* 53

<sup>214</sup> Butler, *Gender Trouble* 53

its historic roots. Significantly for queer theory, she identifies that heterosexuality, like masculine sexual agency, is presumed but not accounted for.<sup>215</sup>

## 2(3)(b) Lacan, Riviere and the Strategies of Masquerade

How is it possible to ‘be’ a man or a woman, without first asking how we come to ‘be’ anything? Jacques Lacan<sup>216</sup> does not believe it is possible to establish the former without asking the latter. By asking how the method of ‘being’ was instituted in a paternalistic economy, it is revealed to be pre-ontological.<sup>217</sup> With the law using pre-suppositional sexual difference as a grounding mechanism, ‘being’ and ‘having’ become linguistically divergent positions.<sup>218</sup> ‘Being’ and ‘having’ the phallus illustrate this divergence. Women, unable to have the phallus, must become the phallus, and this reflective ‘being’ is powerful in so far as, without the reflection, ‘having’ the phallus would be meaningless, meaning that women ‘must become what men are not.’<sup>219</sup>

Butler believes that Lacan’s theory is based on the presupposition that ‘being’ is always effected via a signifier, in Lacan’s case, the penis. ‘Having’ and ‘being’ are interdependent and mutually exclusive, and, when grounded in reality, are revealed as incommensurable. Who decided what was signified and what was the signifier?<sup>220</sup> Lacan states that the masculine identity gives the *appearance* that it originates meaning and requires women to reflect this illusion to give it foundation.<sup>221</sup> She does this through masquerade,<sup>222</sup> suggesting that all ‘being’ is a masquerade and that there is a ‘being’ prior to the masquerade

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<sup>215</sup> Butler, *Gender Trouble* 55

<sup>216</sup> Jacques Lacan, *The Meaning of the Phallus* in *Feminine Sexuality: Jacques Lacan and the École Freudienne*, eds. Juliette Mitchell and Jacqueline Rose trans. Jacqueline Rose, Norton, (New York, 1985)

<sup>217</sup> Butler, *Gender Trouble* 56

<sup>218</sup> Butler, *Gender Trouble* 56

<sup>219</sup> Butler, *Gender Trouble* 58

<sup>220</sup> Butler, *Gender Trouble* 56

<sup>221</sup> Butler, *Gender Trouble* 57

<sup>222</sup> Butler, *Gender Trouble* 59

hidden behind a performative production.<sup>223</sup> It begs the question of what is being masked.

Lacan claims that the purpose of the masquerade is to resolve the refusal of love, and he locates female homosexuality in this disappointment, although Butler is clearly suspicious of his claim, stating that lesbianism is a refusal of sexuality only in so far as sexuality is presumed to be heterosexual.<sup>224</sup>

Joan Riviere also identifies that femininity is a mask. In 'Womanliness as a Masquerade'<sup>225</sup> she views the mask as a method of conflict resolution,<sup>226</sup> with the aim of the acquisition of the attributes of sexuality being to suppress anxiety, with homosexuals exaggerating their 'heterosexuality' as an internal disguise against their homosexuality.<sup>227</sup> Butler isn't clear about what attributes are exaggerated, suggesting that it may be that gay men may simply not appear that different to their heterosexual counterparts.<sup>228</sup> Lacan might argue this is a gay man attempting to 'have' the phallus,<sup>229</sup> or a gay woman renouncing the 'having' of the phallus to avoid the condemnation of those whom she must have 'castrated' to obtain it.<sup>230</sup> Femininity and male homosexuality are analogous in so far as they are both attempts at masquerade - femininity, the mask of a woman who wishes for masculinity and the masculinity of the male homosexual a mask seeking to hide (from himself) his femininity.<sup>231</sup> This does not, however, explain female homosexuality which Riviere considers to be asexual in nature.<sup>232</sup> Riviere believes that lesbians seek recognition from men that they are equals (or as she puts it, they seek to be recognised as 'men' themselves)<sup>233</sup>

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<sup>223</sup> Butler, *Gender Trouble* 63

<sup>224</sup> Butler, *Gender Trouble* 63

<sup>225</sup> Joan Riviere *Womanliness as a Masquerade* in *Formations of Fantasy*, eds. Victor Burgin, James Donald, Cora Caplan, Methuen, (London, 1986)

<sup>226</sup> Butler, *Gender Trouble* 64

<sup>227</sup> Butler, *Gender Trouble* 65

<sup>228</sup> Butler, *Gender Trouble* 65

<sup>229</sup> Butler, *Gender Trouble* 65

<sup>230</sup> Butler, *Gender Trouble* 65

<sup>231</sup> Butler, *Gender Trouble* 66

<sup>232</sup> Butler, *Gender Trouble* 66

<sup>233</sup> Butler, *Gender Trouble* 66

without homosexual desire; in other words, lesbians sustain a masculine identification to enable them to engage in public discourse on a level playing field with men whilst avoiding sexual exchange economy;<sup>234</sup> a lesbian is a female homosexual, without homosexuality.<sup>235</sup> Riviere considers masquerade to be central to 'womanliness' and draws no distinction between the masked and unmasked woman.<sup>236</sup>

## 2(3)(c) Freud and the Melancholia of Gender

Butler moves from anthropology to psychoanalysis with her review of Freud who, like Lévi-Strauss, locates gender within the Oedipal incest taboo. Freud argues<sup>237</sup> that to cope with loss of a person we have loved, we incorporate them this into our ego through acts of imitation, retaining some of their attributes as a way of retaining them.<sup>238</sup> This is relevant for gender formation as the incest taboo means we lose a love when we must deny our mother or father as objects of sexual desire. If the object of our denial is of the opposite sex, we reject the object, but not the desire – we turn our desire to other desirable objects of the opposite sex.<sup>239</sup> If the object we deny is homosexual in nature, we deny both the object and modality of desire due to the homosexuality taboo.<sup>240</sup>

Freud argues that Oedipal complex shapes gender identity is either a positive (same-sex identification) or negative (opposite-sex identification) way. The loss of the parent we desire results in either an identification with the object of loss, consolidating their masculinity or femininity into our ego, resulting in homosexuality, or deflection of the aim of the object, resulting in heterosexuality. the mother results in the object of our desire being transformed

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<sup>234</sup> Butler, *Gender Trouble* 67

<sup>235</sup> Butler, *Gender Trouble* 68

<sup>236</sup> Butler, *Gender Trouble* 67

<sup>237</sup> Sigmund Freud, *The Ego and the Super-Ego (Ego Ideal) The Ego and the Id*, trans. Joan Riviere, ed. James Strachey, Norton, (New York, 1960 originally published in 1923)

<sup>238</sup> Butler, *Gender Trouble* 74

<sup>239</sup> Butler, *Gender Trouble* 75

<sup>240</sup> Butler, *Gender Trouble* 75



into desire for either the opposite or same sex via the renouncing of either, or both, the aim and the object of our desire.<sup>241</sup> Freud seems to suggest that, for women, the transformation of this melancholia into desire will depend on how masculine or feminine the disposition of the child was initially. Butler suggests that he ‘founders’ here as he does not elaborate on which aspects of femininity are dispositional and which are the consequence of identification, or indeed, how we identify ‘feminine’ and ‘masculine’ dispositions at all. Do we presume female desire for the father as evidence of femininity just because we start our analysis with a presumption of a heterosexual matrix of desire, and is bisexuality simply two heterosexual desires contained within a single psyche?<sup>242</sup> The construction of our ego, which has absorbed this melancholia as a survival mechanism, also involves the internalisation of gender identity.<sup>243</sup> This serves to reinforce taboos and consolidate identity through the ‘rechanneling and sublimation of desire’ whilst regulating and determining masculine and feminine gender identification. Essentially, this means that gender identification is a melancholia of internalised sexual prohibition.<sup>244</sup>

Gender identification is an internalised melancholia in which the sex of the prohibited object is internalised as a prohibition; this sanctions and regulates gender identity and heterosexual desire. The resolution of the Oedipal complex is also responsible for the regulation of not only the incest taboo, but also, prior to this resolution, the taboo against homosexuality; resulting in one identifying with the same-sex love object and internalising both the aim and object of desire.<sup>245</sup> Indeed, Butler considers that the taboo against

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<sup>241</sup> Butler, *Gender Trouble* 75

<sup>242</sup> Butler, *Gender Trouble* 77

<sup>243</sup> Butler, *Gender Trouble* 80

<sup>244</sup> Butler, *Gender Trouble* 80

<sup>245</sup> Butler, *Gender Trouble* 80

homosexuality precedes the taboo over heterosexual incest, meaning that the homosexuality taboo creates the heterosexual disposition resulting in the Oedipal conflict.<sup>246</sup>

From Freud's work in this area, Butler extracts the position that the incest taboo, presumed by Freud to be primary, is in fact secondary to the homosexual taboo and is ultimately an effect of the law.<sup>247</sup> Dispositions are a result of enforced sexual prohibitions,<sup>248</sup> and what becomes clear is that the dispositions are acquisitions prompted by attempts to adhere to these laws. In both gender and sexuality, Freud exposes that we take on our expected roles and perform as required.

#### 2(3)(d) Gender Complexity and the Limits of Identification

Butler suggests that her review of psychoanalytic problems of identification differs from the usual critiques of this field in as much as she has strayed from the usual focus on the maternal, which often only reinforces the binary heterosexist framework.<sup>249</sup> She suggests that multiple coexisting identifications produce conflicts and convergences which challenge the binary masculine / feminine placements with respect to the paternal law.<sup>250</sup> This multiplicity of identities suggests that the law is not deterministic or even a singular entity.<sup>251</sup> Butler identifies that recourse to paternalistic law as a universal foundation for identity is a fantasy.<sup>252</sup> We should reconsider identity without this fiction, whilst offering a schematic of where it conforms or flouts culturally imposed standards of gender identity.<sup>253</sup>

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<sup>246</sup> Butler, *Gender Trouble* 80

<sup>247</sup> Butler, *Gender Trouble* 83

<sup>248</sup> Butler, *Gender Trouble* 83

<sup>249</sup> Butler, *Gender Trouble* 83

<sup>250</sup> Butler, *Gender Trouble* 85

<sup>251</sup> Butler, *Gender Trouble* 86

<sup>252</sup> Butler, *Gender Trouble* 86

<sup>253</sup> Butler, *Gender Trouble* 86

If identity can be subversive as well as compliant, where do we locate the loss? Shaffer,<sup>254</sup> Torok and Abraham<sup>255</sup> argue that incorporation of this loss into an interior ‘psychic’ space is a fantasy in as much as the interior space is ‘created.’<sup>256</sup> Gender identity considered as a melancholic structure incorporates the loss of the pleasurable object, and Irigary argues that Freud’s articulation of melancholy and the development of femininity are similar and a psychoanalytic norm for women. She refutes this and Butler agrees with her.

### 2(3)(e) Reformulation of Prohibition as Power

The influence of Foucault’s critique of foundationalism is evident throughout Butler’s critique of psychoanalysis and anthropological attempts to locate our gender, sex and sexuality within an essentialist framework.<sup>257</sup> Feminist theorists have been attracted to the psychoanalytic accounts of gender difference as they locate the primary constructions of gender as Oedipal and pre-Oedipal.<sup>258</sup> Foucault believes that the law creates the very thing that it prohibits. Is it then possible to recast the prohibition against incest as productive, rather than prohibitive? If we are able to do so, then ‘the prohibition that founds the ‘subject’...becomes the means by which...gender identity is constituted’.<sup>259</sup>

Rubin<sup>260</sup> believes that the incest taboo produces our categories of permitted and prohibited sexual partners, ensuring that kinship groups are preserved by exogamic

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<sup>254</sup> Roy Schafer, *A New Language for Psycho-analysis*, Yale University Press, (New Haven, 1976)

<sup>255</sup> Nicholas Abraham and Maria Torok, *Deuil ou mélancolie, introjecter-incorporer, réaite, métapsychologique et fantasme* in *L’Écorce et le noyau*, Flammarion, Paris, 1987 Translated as *The Shell and the Kernel: Renewals of Psychoanalysis*, ed., trans., and with intro by Nicholas T Rand, University of Chicago Press, (Chicago, 1994)

<sup>256</sup> Butler, *Gender Trouble* 86

<sup>257</sup> Butler, *Gender Trouble* 91

<sup>258</sup> Butler, *Gender Trouble* 92

<sup>259</sup> Butler, *Gender Trouble* 93

<sup>260</sup> Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality in Pleasure and Danger*, Ed Carol S Vance, Routledge, (London, 1984)

heterosexuality.<sup>261</sup> She maintains that prior to this transformation from a biological male or female, into a gendered man or woman, each child contains all of the sexual possibilities available to human expression.<sup>262</sup> This primary polymorphousness implies that the law follows sexuality, in contrast to a Foucauldian analysis which, when applied to the incest taboo, shows that it produces both exogamic heterosexuality and transgressive homosexuality.<sup>263</sup> Homosexuality and heterosexuality are effects of the law, as is the illusion of any extant sexuality that appears to pre-exist the law.<sup>264</sup>

Rubin believes that the law transforms sex into gender, placing the acquirer of the gender in an apparent position of knowledge – they must know the pre-legal and post-legal even although they exist, linguistically and temporally, in an era after the law.<sup>265</sup> Butler does not accept this possibility as the description of the ‘before’ takes place within the context of the ‘after’ – the law colours any interpretation of an era before the law.<sup>266</sup> Butler cannot see how Rubin is able to access a pre-legal era to conclude that the destruction of compulsory heterosexuality would de-gender our bodies.<sup>267</sup>

An acceptance of Foucauldian criticism of the viability of knowing the ‘before’ shows that the incest taboo is a product of the law, an emanation of power.<sup>268</sup> The universality of the incest taboo does not mean that it is necessarily the same across cultures, but simply that it exists somewhere in every social form.<sup>269</sup> Butler argues that what the taboo does is forbid and dictate sexuality in one form, and produces it in another. The law that prohibits

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<sup>261</sup> Butler, *Gender Trouble* 94

<sup>262</sup> Butler, *Gender Trouble* 94

<sup>263</sup> Butler, *Gender Trouble* 94

<sup>264</sup> Butler, *Gender Trouble* 94

<sup>265</sup> Butler, *Gender Trouble* 94

<sup>266</sup> Butler, *Gender Trouble* 95

<sup>267</sup> Butler, *Gender Trouble* 96

<sup>268</sup> Butler, *Gender Trouble* 96

<sup>269</sup> Butler, *Gender Trouble* 97

incestuous unions at the same time invites those unions.<sup>270</sup> In doing so, the production of heterosexuality and gender identities require the prohibition of homosexuality. Bisexuality and homosexuality are, psychoanalytically, primary libidinal positions, with heterosexuality the produced construction based on their repression; heterosexuality has no pre-cultural status.<sup>271</sup>

## 2(4) Chapter 3: Subversive Bodily Acts Introduction:

Chapter three further develops Butler's assertion of the performativity of gender. She rejects universal maternalism as a product of the same discourse that is challenged as oppressive to women in the first place. She also rejects the claims that homosexuality produces 'non-identity', or is a rejection of the 'real', arguing instead that identity ought to be appropriated, recast and redeployed, rather than rejected. Finally, by analysing the performative complexity of drag, Butler shows that gender is in many ways, simply a drag performance.

### 2(4)(a) The Body Politics of Julia Kristeva

Butler commences chapter 3 by reviewing the work of Julia Kristeva<sup>272</sup> and her engagement with Lacan's theory of language. Kristeva challenges Lacan's presumption that cultural meaning requires repudiation of the maternal body. She does so by arguing that there is a space for 'semiotic' language as well as the symbolic language to which Lacan exclusively attached cultural significance.

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<sup>270</sup> Butler, *Gender Trouble* 97

<sup>271</sup> Butler, *Gender Trouble* 98

<sup>272</sup> Julia Kristeva, *The Body Politics of Julia Kristeva* French Feminist Philosophy Vol. 3, No. 3, Winter 1989, 104-118

For Foucault, only discourse determines ‘sex’<sup>273</sup> meaning that the ‘maternal libidinal economy’ is essentially a production of the historic organisation of sexuality. Kristeva believes the law to be an exclusively prohibitive entity whereas Foucault and Butler believe that it is also productive; by not engaging in the productive element of the law, Kristeva does not identify that sex is a product of this productive element of the paternal law where the agency and object of repression are facets of the same entity.<sup>274</sup>

#### 2(4)(b) Foucault, Herculine and the Politics of Sexual Discontinuity

For Foucault, sexuality is a locus of power and he argues in *The History of Sexuality: Volume One* that sex is a production of the regulation of sexuality.<sup>275</sup> Sex is an effect of this regulation, rather than the origin, and ‘sexuality’ is a system of discourse that produces sex and perpetuates power relations.<sup>276</sup> Sex must therefore be reconceptualised within sexuality, which, like Butler, he states is nothing more than a social construction. Foucault disavows the emancipatory models of sexuality as he does not believe that they deconstruct the sexed body which is a historic production of power relations.<sup>277</sup> The category of sex is regulative and any critique which accepts the categorisation as pre-suppositional uncritically legitimates the power/knowledge regime<sup>278</sup> although Butler believes that his own theory maintains an emancipatory ideal that his own critical apparatus would suggest is not possible.<sup>279</sup>

Foucault in some ways contradicted his theory of sexuality offered in *The History of Sexuality Volume One* in a short introduction he wrote to the journals of a nineteenth century

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<sup>273</sup> Butler, *Gender Trouble* 113

<sup>274</sup> Butler, *Gender Trouble* 114

<sup>275</sup> Butler, *Gender Trouble* 120

<sup>276</sup> Butler, *Gender Trouble* 121

<sup>277</sup> Butler, *Gender Trouble* 121

<sup>278</sup> Butler, *Gender Trouble* 122

<sup>279</sup> Butler, *Gender Trouble* 119

French hermaphrodite, Herculine Barbin.<sup>280</sup> Foucault believes that Herculine's hermaphroditic body exposes the regulatory strategies of sexual categorisation<sup>281</sup> revealing the disconnect between sex and function –i.e. our activities are not dictated by our gender. He believes that Herculine is essentially sexless and that prior to h/er exposure as a hermaphrodite s/he was free of the juridical dictat of gender performativity. It is difficult to see how Foucault is able to square this apparent emancipation discourse from his own theory in *The History of Sexuality: Volume One*.

Herculine's position is comparable with the discourse that produces female homosexuality, although it is equally tempting to categorise Herculine's attraction to women as a masculine orientation as a result of h/er penis.<sup>282</sup> Foucault believes that Herculine had an idyllic existence prior to the enforcement of a singular sexual identity upon h/er,<sup>283</sup> Butler believes that he sees h/er happiness as contingent on h/er life within the homosexual environment.<sup>284</sup> Butler suggests that perhaps Foucault wants to 'have it both ways' – suggesting that homosexuality produces non-identity and is instrumental in overthrowing the category of sex.<sup>285</sup> Herculine's own account of h/er sexual conquests do not support Foucault's interpretation. S/he participates in the categories Foucault would have h/er excluded from and h/er anatomical difference allows her to 'rearrange' sex in a way that challenges the differences between heterosexual and lesbian exchange, demonstrating convergence rather than separation.<sup>286</sup>

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<sup>280</sup> Michel Foucault, ed., *Hercluin Barbin, Being the Recently Discovered Memoirs of a Nineteenth Century Hermaphrodite*, trans. Richard McDongall, Colphon, (New York, 1980)

<sup>281</sup> Butler, *Gender Trouble* 122

<sup>282</sup> Butler, *Gender Trouble* 126

<sup>283</sup> Butler, *Gender Trouble* 127

<sup>284</sup> Butler, *Gender Trouble* 127

<sup>285</sup> Butler, *Gender Trouble* 127

<sup>286</sup> Butler, *Gender Trouble* 128

Foucault's contention that homosexual contexts produce sexual non-identity has a corollary of contending that heterosexual contexts produce sexual identity.<sup>287</sup> With identity for Foucault an instrument of the regulatory regime, it is unclear whether that regulation is reproductive, heterosexual, or something else.<sup>288</sup> If homosexuality produces non-identity then it does not rely on identities being alike and could no longer be described as homosexuality.<sup>289</sup>

Herculine is, in many ways, the embodiment of Butler's theory of gender performativity. Whilst for Foucault s/he has no identity before one is forced upon h/er, Butler correctly identifies that this essentially ignores his own theory on the productive element of the law. Everything about Herculine's life is, in essence, a gender performance. H/er life before sexual singularity is forced upon h/er is an oppositional relation of the sex s/he was ultimately legally forced to become; however, even this relation is a performance and needs the other for its existence. Foucault cast Herculine as living a life of bucolic innocence before tragedy befell h/er; Butler disagrees. Herculine was never 'outside of the law' in the way Foucault contends.<sup>290</sup>

#### 2(4)(c) Monique Wittig: Bodily Disintegration and Fictive Sex

Wittig<sup>291</sup> believes that sex is a political manifestation of reproductive sexuality, the only reason, she believes, for the binary division.<sup>292</sup> She echoes De Beauvoir's claim that 'one is not born a woman'<sup>293</sup> raising questions about what one was before 'becoming'.<sup>294</sup> Sex and gender are synonymous, with sex simply a gendered category. Wittig's second claim is that a

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<sup>287</sup> Butler, *Gender Trouble* 129

<sup>288</sup> Butler, *Gender Trouble* 129

<sup>289</sup> Butler, *Gender Trouble* 129

<sup>290</sup> Butler, *Gender Trouble* 135

<sup>291</sup> Monique Wittig *One is not born a woman* Feminist Issues Vol. 1, No. 2 Winter (1981) at 48

<sup>292</sup> Butler, *Gender Trouble* 143

<sup>293</sup> Butler, *Gender Trouble* 143

<sup>294</sup> Butler, *Gender Trouble* 141



lesbian is not a woman as a woman only exists as a term to stabilize and consolidate the oppositional relation to a man, that relation being inherently heterosexual.<sup>295</sup> In refusing heterosexuality, a lesbian is no longer definable within the oppositional relation; she is neither male nor female, she is 'sexless'.<sup>296</sup> For Wittig, as well as becoming a woman, one can clearly choose not to become a woman, or a man.<sup>297</sup>

Wittig argues that linguistically, the labelling of sex supports the operation of compulsory heterosexuality, a relation which is not reciprocal or binary in the usually understood sense. 'Sex' is always female, and males are never sexed, as to be sexed is relational and the male is a universal person.<sup>298</sup> Sex is discursively produced and is oppressive to women, gays and lesbians and, for Wittig, incapable of reformation and therefore in need of destruction.<sup>299</sup> Naming the sexes is an act of domination, an 'institutionalized performative'<sup>300</sup> which compels us to conform to that which has been forced upon us – the category compels the social assimilation and is a political category rather than a natural fact.<sup>301</sup>

Wittig believes that only by becoming lesbian or gay can the downfall of presumed heterosexuality occur; this involves refuting heterosexuality as it is essentially an all-encompassing oppressive regime, meaning radical conformity or radical revolution – in other words it is all or nothing.<sup>302</sup> Not everyone agrees with Wittig and Butler does not accept that there is a radical disjunction between heterosexuality and homosexuality as both heterosexual and homosexual relationships share structures.<sup>303</sup> Butler concedes that compulsory

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<sup>295</sup> Butler, *Gender Trouble* 143

<sup>296</sup> Butler, *Gender Trouble* 144

<sup>297</sup> Butler, *Gender Trouble* 144

<sup>298</sup> Butler, *Gender Trouble* 145

<sup>299</sup> Butler, *Gender Trouble* 145

<sup>300</sup> Butler, *Gender Trouble* 147

<sup>301</sup> Butler, *Gender Trouble* 147

<sup>302</sup> Butler, *Gender Trouble* 154

<sup>303</sup> Butler, *Gender Trouble* 155

heterosexuality operates ‘with the force and violence’<sup>304</sup> that Wittig articulates, but Butler does not believe this to be its only *modus operandi*.

Wittig believes that being lesbian or gay means that you no longer ‘know’ your sex and that you muddy the waters of the categorisation to the point where it is impossible to categorise.<sup>305</sup> Butler does not believe this to be as emancipatory as it sounds as it silences discourse within LGBTQ culture that articulates specifically gay identities by appropriating, redeploying and parodying the categories of sex.<sup>306</sup> The refusal of these categories negates the reclamation of the terminology by LGBTQ, and the destabilizing effect they have on the categories of sex.<sup>307</sup> For Butler, even if Wittig is right and lesbianism is a refusal of heterosexuality, even the refusal is an engagement with the category, dependent on the terminology it purports to transcend.<sup>308</sup> If sexuality and power are coextensive, lesbianism is no more or less constructed than any other sexuality.

For Wittig, becoming a lesbian, rather than de Beauvoir’s woman, suggests no solidarity between heterosexual woman and lesbians. ‘Becoming’ a lesbian is a conscious act, a refutation of heterosexuality and sexual binarism. But what qualifies as a lesbian? Are you lesbian if you reject the disjunction between hetero and homosexual economies?<sup>309</sup> Do other conscious acts qualify as foundational? Can lesbian sexuality be understood as a contestation of lesbianism as well as of the categories of ‘sex’ and ‘women’? Wittig suggests that there is a ‘necessary relationship between figurative language and the homosexual point of view’<sup>310</sup> as homosexuality challenges ‘the real’ via syntax and semantics as they are outside of ‘the real’ which they understand to be exclusory. Butler therefore considers it a

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<sup>304</sup> Butler, *Gender Trouble* 155

<sup>305</sup> Butler, *Gender Trouble* 156

<sup>306</sup> Butler, *Gender Trouble* 156

<sup>307</sup> Butler, *Gender Trouble* 156

<sup>308</sup> Butler, *Gender Trouble* 158

<sup>309</sup> Butler, *Gender Trouble* 162

<sup>310</sup> Butler, *Gender Trouble* 163

mistake to construct gay/lesbian identity in the same exclusory way as it institutes the dependence that it seeks to overthrow. Lesbianism by Wittig's definition would require heterosexuality as it defines itself by the exclusion of it and in doing so denies itself the opportunity to redefine the constructs by which it is constituted. For Butler it would be more effective to appropriate and redeploy the categories of identity, not merely to contest them, articulating a convergence of multiple discourses and rendering 'sex' as an identity permanently problematic.<sup>311</sup>

## 2(4)(e) Bodily Inscriptions, Performative Subversions

Is there a political shape to 'women', articulable prior to the political and epistemic point of view?<sup>312</sup> The sex/gender distinction and the category of 'sex' presupposes a generalisation already in existence prior to the acquisition of the sexed body, appearing as a passive, culturally sourced entity. The construct of 'the body' must itself be questioned in this theory.<sup>313</sup> Wittig suggests that a pre-existing, culturally specific epistemology establishes the 'naturalness of sex'.<sup>314</sup> Foucault considers the body as a tablet on which cultural inscriptions are inscribed.<sup>315</sup> That cultural inscription is continuous also infers that there is a body prior to the commencement of inscription.<sup>316</sup>

Mary Douglas in *Purity and Danger*<sup>317</sup> suggests 'the body' is established through cultural codes defining what our 'bodies' are and are not.<sup>318</sup> The punishment of transgression has, as its function, the imposition of compliance and the avoidance of 'pollution' of the body where the 'polluter' is always in the wrong. The HIV crisis in the gay community is a

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<sup>311</sup> Butler, *Gender Trouble* 163

<sup>312</sup> Butler, *Gender Trouble* 164

<sup>313</sup> Butler, *Gender Trouble* 164

<sup>314</sup> Butler, *Gender Trouble* 165

<sup>315</sup> Butler, *Gender Trouble* 165

<sup>316</sup> Butler, *Gender Trouble* 166

<sup>317</sup> Mary Douglas in *Purity and Danger* Routledge, (London, 1969)

<sup>318</sup> Butler, *Gender Trouble* 167

contemporary construction of this pollution problem although homosexuality constitutes a pollution regardless of the presence of HIV, evidenced by lesbian body also being a pollutant despite the low-risk of HIV – the sexually transgressive act is the polluter as it reforms the body along different cultural lines.<sup>319</sup>

## 2(4)(f) From Interiority to Gender Performatives

If gender is truly a construction, inscribed on our bodies, then it can be neither true nor false.<sup>320</sup> *Esther Newton in Mother Camp: Female Impersonators in America*<sup>321</sup> suggests that impersonation reveals the mechanisms of fabrication and that drag subverts the distinction between the inner and outer space, effectively mocking both the expressive model of gender and the notion of true gender identity.<sup>322</sup> Drag is a double inversion, showing appearance as an illusion that states that the outside can be feminine and the inside masculine, but also the opposite.<sup>323</sup> This contradictory claim displaces gender signification, and, despite feminist critique that drag is degrading to women, Butler believes that the complexity of the performance shows the contingent dimensions of corporeality – anatomical sex, gender identity and gender performativity.<sup>324</sup> Sex and gender are denaturalised by performance. The parody assumes no original and instead parodies the very notion of originality exposing the fallacy of naturalised or essentialist gender identities,<sup>325</sup> revealing that the original was indeed derived.<sup>326</sup>

How do we understand the gendered body in these circumstances? Butler suggests that gender must be considered a corporeal style, an act, a performance where the

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<sup>319</sup> Butler, *Gender Trouble* 168

<sup>320</sup> Butler, *Gender Trouble* 174

<sup>321</sup> *Esther Newton in Mother Camp: Female Impersonators in America* University of Chicago Press (Phoenix Ed edition) (1979)

<sup>322</sup> Butler, *Gender Trouble* 174

<sup>323</sup> Butler, *Gender Trouble* 174

<sup>324</sup> Butler, *Gender Trouble* 175

<sup>325</sup> Butler, *Gender Trouble* 175

<sup>326</sup> Butler, *Gender Trouble* 176

performative aspect suggests construction and meaning,<sup>327</sup> Without the construction and performance, there would be no gender at all.<sup>328</sup> Gender is unstable in terms of its locus as a productive entity and must instead be understood as a socially temporal illusion.<sup>329</sup> Gender cannot be internalized as a norm as the 'internal' is a surface signification and gender norms are a fantasy.

If gender attributes are performative rather than expressive they constitute the identity they express. The distinction between 'expression' and 'performance' is crucial – performativity infers no pre-existing identity, no true or false, no real or unreal. Its creation via performativity demonstrates that notions of essential sex, of masculinity and femininity are part of the strategy of concealment of this performativity.

## 2(5): From Parody to Politics

Is an identity necessary for identity politics to succeed? In terms of feminism, the category appears, on reflection, to be phantasmic, restrictive, and capable of locating agency only in a pre-discursive 'I'. The identities used as foundational in feminist politics constrain feminism from achieving its set goals. For Butler, identity politics can succeed without this if we accept that all of our gendered identities are simply performance; we are all in drag.

## 2(6): Conclusions for Queer Theory

Butler exposes and confirms what Foucault identified in *The History of Sexuality Volume One: The Will to Knowledge*. Gender, instead of sexuality, is the locus of her enquiry,

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<sup>327</sup> Butler, *Gender Trouble* 176

<sup>328</sup> Butler, *Gender Trouble* 177

<sup>329</sup> Butler, *Gender Trouble* 179

although she establishes that both sexuality and gender are two sides of the same coin. They reflect one another, and have been used as a method of control. Both are products of discourse, and, significantly for queer theory, both are artificial social constructions.

Butler shows that by universalising the category of 'women', we impose a structure that is not necessarily present. By doing so we de-legitimise the context within which some women experience their personhood. By universalising women as a single hegemonic subject, the binary is reinforced permitting only two gendered categories. Furthermore, Butler shows that not only is gender a cultural imposition, but that sex is no more than a relational gendered category, and also artificial. Both sex and gender form the core of our identity, which is simply a performative construction, a product of the system that produces us as gendered subjects for the purposes of control and regulation. We cannot escape gender, cannot refuse to perform, and Butler is not convinced that our identity would exist at all without gender. It should be noted that in the second edition of *Gender Trouble*, Butler somewhat revises her totally negative interpretation of universality. Universality is itself productive when strategically used as a non-prescriptive, open ended category. If future oriented,<sup>330</sup> it can produce the reality it claims to represent, and therefore is of some benefit to sexual minorities that proclaim it proleptically.<sup>331</sup>

Butler continues to expose the artificiality of gendered bodies in her analysis of the works of Lacan, Lévi-Strauss and Freud. She demonstrates that, whilst significant, their investigations into gender have become hegemonic in terms of feminist theory. In seeking to establish a feminine universality, the relational aspect of gender is ignored, the gender binary is reinforced, and heterosexism is entrenched. Butler does not believe that an adequate analysis is given of gay and lesbian identities within this framework, and when further

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<sup>330</sup> Butler, *Gender Trouble* xviii

<sup>331</sup> Butler, *Gender Trouble* xvii

psychoanalytical investigation takes place, what is exposed is the presumption of a pre-existing sexuality, an essentialist nature, unconstructed by the law. Butler does not believe this is possible as she does not accept that it is possible to know the 'before' when viewed from the 'after'. The incest taboo, the psychoanalytical root of our sexuality, would seem to show that polymorphism and homosexuality are our primary states, and that heterosexuality is a production of the prohibition of these states; heterosexuality depends on homosexuality for its very existence.

For queer theory, this is significant. Butler's analysis here confirms the Foucauldian theory of the productivity of the law. We are not in a position to say whether our sexuality existed before the prohibition and controlling mechanisms of the law, and are certainly not able to advance the argument that heterosexuality is our essentialist nature. All we can say with any certainty is that all of our sexualities are productions of power and prohibition. This places heterosexuality in an equal position to homosexuality and the other minority sexualities. The denaturalising of heterosexuality removes the presumed superiority of it.

In his review of the journals of Herculine Barbin, Butler shows that even Foucault relies somewhat on sexuality as emancipatory ideal. She shows that our sexuality, whatever that is, is a product of the regulatory regime, despite Foucault's contention that Herculine was outside of the law. She shows that sex is simply a gendered category and that compulsory heterosexuality operates with some of the same relationship structures as homosexuality. Refusal to engage with pre-set categories is, in itself, an engagement; the body is simply a template on which cultural inscriptions of sex and gender are written.

Finally, in exploring drag culture, Butler shows that gender is simply a performance. Whilst drag may be a performance in an entertainment context, this belies the complexity on show. Drag displaces gender in many ways, denaturalising it and showing gender identity as

artificial, and the performance to be all that gender is. There is no natural gender, no pre-existing template to be adhered to or subverted and the foundationalism used to justify gender identity and any adherent sexuality is simply a fiction. This anti-foundationalist approach is essentially queer. It is a rejection of what is considered the normative gender role, and delinks gender from any presumed correlation to sexual activity, sexuality, social expectations, and, biological determinism. Gender is freed from these constraints when viewed as performative.

The next chapter will focus on critiquing the law on marriage and civil partnership in Scotland. Neither institution is discussed or examined in any great detail in the work of Butler and Foucault, however, it seems uncontroversial to state that both marriage and civil partnership are products of the discourse on sexuality. It is not the intention of this thesis to critique the entirety of the law on marriage and civil partnership from a queer perspective, the intention instead is to focus my critique on four main areas. Firstly, I will explain why the concept of marriage is problematic from a queer perspective. The higher social standing afforded to marriage and civil partnership is inherently discriminatory, the law used as the tool to ensure this elevated status. I will follow this by critiquing the current law on gender recognition, both generally, and in particular where the law on marriage and civil partnership is used as a determinant for the recognition of the seeker of a gender recognition certificate. I will then illustrate how the concept of gender, whilst superficially irrelevant for marriage, persists in the insistence of the couple structure, a remnant of the historic heterosexual and gender complimentary nature of marriage. Finally, I will examine religious marriage, asking whether the outsourcing of a state function to religious organisations, permitted to discriminate on the basis of the gender of the parties to a marriage, is tolerable.



### 3: A Queer analysis of Marriage and Civil Partnership

*‘We want the abolition of the institution of the bourgeois nuclear family. We believe that the bourgeois nuclear family perpetuates the false categories of homosexuality and heterosexuality by creating sex roles, sex definitions and sexual exploitation. The bourgeois nuclear family as the basic unit of capitalism creates oppressive roles of homosexuality and heterosexuality...it is every child’s right to develop in a non-sexist, non-racist, non-possessive atmosphere which is the responsibility of everyone, including gays, to create’*

‘Third world gay liberation manifesto’ New York Circa 1970<sup>332</sup>

#### 3(1): Introduction

Both Foucault and Butler demonstrate the weakness, and criticise the essentialist nature of, the hegemonic binary when applied to gender, sex, and sexuality. Foucault shows how sexuality has been created as a determinist characteristic in order to exercise power. Butler demonstrates that sex and gender are two sides of the same coin – performative constructions that bear little scrutiny. How then does this relate to queer theory, and what significance has this had on the law on marriage and civil partnership?

Both Butler and Foucault expose the creation of artificial binaries to which people are presumed to belong, based on their genitalia at birth; even when these genitalia are of questionable specificity, a gender has often been imposed. In the cases of sexuality, gender

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<sup>332</sup> Kate and Deeg ‘Marriage is still the opiate of the Queers’ page 45 in Conrad, R (editor) ‘Against Equality: Queer Revolution Not Inclusion,’ AK Press, 2014

and sex, both Butler and Foucault show that these three categories coalesce in support of the hegemonic binary producing the paradigmatic man and woman, both of whom are presumed to complement the other. Whilst Foucault and Butler acknowledge the existence of the paradigm, both also demonstrate that the binary exists simply to support the existing power matrix – ‘females’ are defined in opposition to ‘males’, their biological differences are viewed as complimentary to the default male biology and their social activities, reactions, emotions and interactions are attributed to biologically determined characteristics, ultimately supporting a continuation of the male hegemony.

Foucault shows how sexual activities have been used to create ‘sexuality’ and that this in turn has been used to exercise power over us by corralling us into categories against which the dominant power can be measured and influenced. He shows that without the ‘perversions’ the ‘normal’ cannot exist; heterosexuality as we know it would be nothing without minority ‘sexualities’ against which to compare it. Some sexualities are productive, useful, utilitarian, others deviant, dangerous and destructive but none of them would exist without the other, and all of them are creations of discourse. Marriage is deployed as an ideal, an aspiration, a method of control, and is simply a product of the bio-power discourse. Sexuality and marriage are both products of this discourse, deployed to reinforce the binary.

In light of recent changes to marriage law allowing for same-sex couplings, along with the creation and development of civil partnership, it must be asked if marriage and civil partnership have become vehicles to destroy the hierarchical binaries, or if whether, despite the inclusion of same-sex couples, marriage and civil partnership remain antithetical to a queer approach to relationships.

### 3(2) What is Queer?

Queer is whatever is at odds with the normal, the legitimate and the dominant.<sup>333</sup> The emergence of a queer critique was, and remains, a challenge to the prevalent discourse that sex, sexuality and gender are essentialist entities; in many ways, at its core, queer theory challenges the categorisation of these characteristics as natural emergences. Queer theory recognises that acceptance of the current binary, and the hierarchical structure therein, is an acceptance of the logic of domination – a logic which justifies the subordination of those who lack power by those who possess it.<sup>334</sup> Queer theory, like Foucault's articulation of power, accepts the reality that power is unevenly distributed but possessed by all; it therefore seeks to undermine the foundations on which these binaries have been constructed by using this power. The aim is not liberation from power (this is not possible) but resistance to its uneven distribution, attempting to more equitably distribute it.

Queer theory emerged as a challenge to the normative mechanisms used by the state to 'name its sexual subjects'.<sup>335</sup> It argues that gender along with both 'deviant' and 'normal' sexual behaviours were social constructs. The social constructivist approach rejects the essentialism that Foucault identifies as developing in the late nineteenth century as an illusion and a product of the discourse of domination. Essentialism links gender roles, gender identity, and sexual orientation within a binary, biologically based, heteronormative gender schema. Queer theory rejects this and is in many ways a challenge to feminist theory, as it is a more radical challenge to the male hegemony,<sup>336</sup> challenging as it does traditional masculinity and masculine roles by subverting them both socially and sexually. Queer theory exposes

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<sup>333</sup> Halperin, DM *Saint Foucault: Towards a Gay Hagiography*, Oxford University Press, New York (1995)

<sup>334</sup> Mimi Marinucci *Feminism is queer: The intimate connection between queer and feminist theory* Zed Books, London, 2010 at 106

<sup>335</sup> David L. Eng with Judith Halberstam and José Esteban Muñoz *What is queer about queer studies now?* Social Text 84–85, Vol. 23, Nos. 3–4, Fall–Winter 2005 at 1

<sup>336</sup> Julie L. Nagoshi, Craig T. Nagoshi, Stephanie Brzuzy *Gender and Sexual Identity – Transcending Feminist and Queer Theory* Springer Science and Business Media, New York, 2014 at 21

sexuality and gender as relations to the dominant discourse, rather than the entities they are purported to be.

A queer approach to gender rejects the male/ female binary as oppressive to transsexuals, intersex and gender non-conforming individuals. Approaching gender from a queer perspective is to reject any determinism placed on gender at birth as oppressive, meaning that 'gender' can be self-defined or fluid. A queer approach to sexuality rejects the intersection of gender and sexuality as deterministic. It also rejects the notion that sexuality is binary in terms of homo / heterosexuality as oppressive to other sexualities which do not identify with these labels. Queer theory rejects these binaries because they support the essentialist discourse and present heteronormativism as the standard by which every person should be measured, but also because central to queer politics is the rejection of state regulation of sexuality.<sup>337</sup> In a legal context, marriage and civil partnership are the state regulation of relationships as the de facto norm.

It is on this basis that marriage, as a social, legal and religious status must therefore be evaluated. Marriage and civil partnership both presume, create and support a number of binary statuses. I will demonstrate that in doing so, they create and support a system that bestows privilege on a discriminatory basis, largely based on historic structures that instil heteronormativity. These structures remain, I will argue, weighed down by the persistence of the influence of gender complementarianism, and therefore remain problematic from a queer perspective.

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<sup>337</sup> Michael Warner, *The Trouble with Normal*, Harvard University Press, Cambridge, (2000) at 88

### 3(3) Queer objections to the social status of marriage

There is a very obvious binary created by the institutions of marriage and civil partnership – you are either married or in a civil partnership, or you are not. Queer critiques of marriage have largely focused on marriage as a vehicle by which a privileged class of person is created<sup>338</sup> and through which dominant power forces are exerted by the expectation of responsibilities and the endowment of rights.<sup>339</sup> The very existence of marriage and civil partnerships as privileged institutions, along with the legal and financial privileges they create, compels compliance and means that only those relationships which ape the heteronormative are worthy of privilege.<sup>340</sup> There is a refusal in both institutions to engage with anything other than ‘coupling’, revealing both marriage and civil partnership to be part of a conservative agenda – the antithesis of queer.<sup>341</sup>

Those who sought inclusion within marriage argued successfully that excluding same-sex couples from marriage denied them the dignity afforded to opposite sex couples.

Norrie<sup>342</sup> and others<sup>343</sup> argue that the state recognition afforded by marriage is essential to ensure that the gay and lesbian identity is demonstrably equal to the heterosexual identity.

This can be contrasted with Ettlebrick who argues that gay and lesbian identity should be

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<sup>338</sup> MC LaScala, *Too Many Eggs in the Wrong Basket: A Queer Critique of the Same-Sex Marriage Movement* *Social Work*, Vol. 52, No. 2 (April 2007), pp. 181-183

<sup>339</sup> See, for example, *An Open Letter to LGBT Leaders who are Pushing Marriage Equality* Kate Borestein in *Against Equality: Queer Revolution, Not Mere Inclusion* edited by Connor, R 2014 AK Press, Baltimore

<sup>340</sup> Kenneth McK. Norrie, *Marriage is for Heterosexuals – may the rest of us be saved from it* 12 *Child & Fam. L. Q.* 363 2000 at 365

<sup>341</sup> Yasmin Nair *Gay Marriage IS a conservative cause* Feb 26 2013 <http://www.yasminnair.net/content/gay-marriage-conservative-cause> retrieved on September 19 2016

<sup>342</sup> Kenneth McK. Norrie, *Now the dust has settled: The Marriage and Civil Partnership (Scotland) Act 2014* *Jur. Rev.* 2014, 2, 135-163 at 142

<sup>343</sup> Andrew Sullivan, *Virtually Normal*, in Robert M. Baird and Stuart E. Rosenbaum (eds.), *Same-Sex Marriage: The Moral and Legal Debate*, Amherst, NY: Prometheus Books (2004),

affirmed because of its difference, and contends that same-sex marriage simply creates two classes of same-sex relationship – one in which sex is permissible, and one in which it is frowned upon.<sup>344</sup>

Ettlebricks's argument could be read as a defence of the argument which states that marriage is a heterosexual institution. In many ways, this is exactly what she *is* saying. It is clear that both of these arguments take a differing perspective of LGBTQI identity, one perceiving it as equal, and one different. It is, however, the discourse on equality which has predominated discussion on marriage, rather than Ettlebrick's more radical acceptance of difference. This equality-led discourse on marriage has been deployed with remarkable success, if the measure of success is that same-sex marriages are legally equal to those of their opposite-sex counterparts, and more widely that opposite –sex couples are no longer seen as superior in the eyes of the law, and society.<sup>345</sup>

A number of arguments were used to counter the equality discourse of the proponents of same-sex marriage. One of them was that the nature of marriage was immutable, universally understood and beyond the power of legislators to alter.<sup>346</sup> This argument is flawed in many ways, both legally and socially. It ignored the obvious competence of the Scottish Parliament to legislate in this area, but further than this, refused to acknowledge that marriage has not remained unchanged historically.<sup>347</sup> Marriage as an institution is a legal structure, not a natural phenomenon. This argument does, however, expose that some view marriage as an elevated social or religious status, rather than primarily a legal institution.

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<sup>344</sup> PL Ettlebrick, *Since When is marriage a path to liberation?* page 20-21 In Suzanne Sherman (ed.) *Lesbian and Gay Marriage*, editor, Temple University Press, (1992)

<sup>345</sup> Kenneth McK. Norrie *Now the dust has settled: The Marriage and Civil Partnership (Scotland) Act 2014* Jur. Rev. 2014, 2, 135-163 at 144

<sup>346</sup> Kenneth McK. Norrie *Now the dust has settled: The Marriage and Civil Partnership (Scotland) Act 2014* Jur. Rev. 2014, 2, 135-163 at 137

<sup>347</sup> Renata Grossi *The meaning of love in the debate for legal recognition of same-sex marriage in Australia* Int. J.L.C. 2012, 8(4), 487-505 page 492

It was also argued that marriage, be it civil or religious, is an elevated social status because of its hetero-exclusivity, and that elevating homosexuality to the same level would somehow devalue all marriages.<sup>348</sup> Norrie<sup>349</sup> attributes the defence of this argument to those who oppose every legal equivalence of non-heterosexual behaviours and relationships and turns their ‘marriage as a message’ argument against them as the very justification for allowing same-sex marriage. Marriage does represent the equivalence of hetero and homosexual relationships, and same-sex marriage is necessary for that reason.

These and other objections, largely rooted in theologically based objections to same-sex relationships generally, are easily dismissible in a legal context when the prevailing discourse, as it has been, is one of formal equality. However, what these equality-led arguments fail to do is to critique the basis for these arguments in the first place, that marriage is held to be a relationship above all others and the standard by which all other relationships are measured. The equality argument fails to engage with the fundamental reality that marriage creates inequality.

Butler herself has conceded that if marriage is to exist, then it should be open to all.<sup>350</sup> She notes however that same-sex marriage could be perceived as a triumph of the conservative agenda, with non-conforming relationship and kinship structures further marginalized and othered.<sup>351</sup> She accepts the validity of the equality agenda, whilst articulating the danger it may herald for queer relationships. All of the arguments against same-sex marriage defend the privileged status of marriage; none of the counter arguments

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<sup>348</sup> Javier Garcia Olivia and Helen Hall *Same-Sex Marriage: An Inevitable Challenge to Religious Liberty and Establishment?* Oxford Journal of Law and Religion, Vol. 3, No. 1 (2014), pp. 25–56 at 28

<sup>349</sup> Kenneth Mck. Norrie *Now the dust has settled: The Marriage and Civil Partnership (Scotland) Act 2014* Jur. Rev. 2014, 2, 135-163 at 142

<sup>350</sup> Judith Butler, *Is Kinship Always already heterosexual?* A Journal of Feminist Cultural Studies 13.1 (2002) page 18

<sup>351</sup> Judith Butler, *Is Kinship Always already heterosexual?* A Journal of Feminist Cultural Studies 13.1 (2002) page 18

critique this status in anyway, and simply request access to the privileged class. Queer influence, I would suggest, is therefore minor.

Warner argues<sup>352</sup> that it is the discriminatory endowment of rights and responsibilities and elevated social status at the expense of others that those who opposed same-sex marriage seek to protect. I would argue that the social elevation of one group can only be achieved by the diminishment of others, and therefore, without the discrimination that is at the heart of both marriage and civil partnership, both institutions would lose the value they possess. Marriage and civil partnership are celebrated *because* they are discriminatory.

The presumption that one relationship should stand above all others, indeed should exist at the expense of others for validation, exposes the queer problem with the social status afforded to marriage. When we ennoble marriage as a society, elevating it to the status of the premier relationship type and the standard against which other relationships must be measured,<sup>353</sup> we devalue every other relationship<sup>354</sup> and directly or indirectly oppress it.

Butler argues that by looking to the state to validate our relationships we allow for the continuation of state hierarchical control.<sup>355</sup> By seeking marriage or civil partnership, we essentially allow the state to dictate which relationships are valuable, and which are not. In Foucauldian terms, marriage is a product of the discourse on sexuality, and the attached benefits are an enticement to comply. The extension of these benefits to another privileged group does nothing to resist the deployment of state power in this area overall; if anything, same-sex marriage is an example of capitulation, rather than resistance – it does not distribute power more equitably, the state simply asserts its power against a larger group of individuals.

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<sup>352</sup> Michael Warner *The Trouble with Normal* 82

<sup>353</sup> Kenneth McK. Norrie *Marriage is for heterosexuals – may the rest of us be saved from it* 2 Child & Fam. L. Q. 363 2000 at 365

<sup>354</sup> Michael Warner, *The Trouble with Normal*, page 82

<sup>355</sup> Judith Butler *Is Kinship Always already heterosexual?* A Journal of Feminist Cultural Studies 13.1 (2002) at 26-27



The extension of marriage to same-sex couples, and the creation of civil partnerships, are both simply further emanations of state control and in queer theory terms, should be resisted for that reason alone. If queer discourse has influenced the social status of marriage in any way, I would argue it is discernable only in so far as queer discourse influenced an increasing acceptance of same-sex relationships as morally equivalent to opposite-sex relationships. In terms of the influence on the binary social status created by marriage and civil partnership, queer theory has had no influence.

The elevated status attained by being in a recognised legal relationship is only one aspect of both marriage and civil partnership. I will now show how gender and heteronormativism persist within marriage and civil partnership law via the use of marriage law within the Gender Recognition Act 2004, through the insistence on the couple structure of both marriage and civil partnership, and through the continuation of religious and belief marriage, permitting discrimination against same-sex couples.

### 3(4) Gender alignment

#### 3(4)(1) Marriage, Civil Partnership gender alignment:

There are no longer any restrictions placed upon the gender of parties to a marriage in Scotland, although there remains a same-sex requirement for civil partnerships. Whilst I would argue that it was undoubtedly a discourse on equality that predominated when the law on marriage in Scotland was changed, it would be dismissive to fail to recognise that this equality argument itself has been influenced in some way by queer discourse. The rejection of biological and social determinism in relation to gender or sexuality has at its core an argument for equality-in-difference and it seems fair to argue in that case that queer theory

has influenced the acceptance of an alternative lifestyle to the heterosexual as deserving of the legal recognition that marriage brings. Is there anything to critique, then, about the gender of the parties involved in a marriage or civil partnership?

One area where I would suggest there is still development in gender discourse, particularly in relation to marriage and civil partnership is the philosophical underpinning, and the legal provisions, of the Gender Recognition Act 2004. This Act, although primarily a vehicle for gender alignment has significant cross over with the law on marriage and civil partnership.

It should be noted that the Scottish Government has given a manifesto commitment to review and reform gender recognition law, to ensure it is in line with international best practice for people who are transgender or intersex.<sup>356</sup> The proposed changes would legislate to allow for self-definition of gender without the need for medical approval, and would, for the first time, recognise those who do not identify with the gender binary.<sup>357</sup> The intention of this chapter is therefore to explain and critique the law on gender recognition in so far as it currently interfaces with the law on marriage and civil partnership. The areas I will criticise have been identified as problematic, evidence of the continued influence of queer theory in this area.

### 3(4)(2) Marriage, Civil Partnership and the Gender Recognition Act 2004

As far as marriage is concerned, gender alignment is not as legally problematic for the individual, or couple, as it used to be. Legally, the purpose of completing the gender alignment process is to obtain a gender recognition certificate, a document legally aligning

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<sup>356</sup> [http://www.snp.org/snp\\_manifesto\\_our\\_action\\_for\\_lgbti\\_people](http://www.snp.org/snp_manifesto_our_action_for_lgbti_people) September 19 2016

<sup>357</sup> <http://www.scottishlegal.com/2016/04/01/snp-promise-legal-recognition-for-third-gender-if-returned-to-power/> September 19 2016

the gender of the holder of the certificate with the gender with which they identify; socially, this recognition confirms the identity of the holder of a gender recognition certificate.

In circumstances where one spouse in a marriage transitions from one gender to another, prior to the Marriage and Civil Partnership (Scotland) Act 2014, it was necessary for that marriage to be ended by divorce before a full gender recognition certificate was issued.<sup>358</sup> The rationale for this was that there was, at the time, a prohibition of same-sex marriage and by recognising the acquired gender of the party holding the full gender recognition certificate, a continuing marriage would essentially mean that people in this category would have been legally in a same-sex marriage. The couple could expedite the time required between posting the notice and registering their partnership under s88(1)<sup>359</sup> and marry in any of the 30 days that followed the posting of the civil partnership notice.<sup>360</sup> The rationale behind the termination of a marriage on these grounds no longer stands in Scotland since same-sex couples can now marry.

Since the introduction of same-sex marriage, it is now the case that if both parties agree, the marriage can continue. Agreement between the spouses or not, the marriage is considered a ‘protected Scottish marriage’<sup>361</sup> if the marriage was solemnised in Scotland and a ‘protected marriage’<sup>362</sup> if solemnised in England, Wales or any jurisdiction outside of the UK. The issuance of a full gender recognition certificate will be contingent on the spouse of the party seeking the gender recognition certificate stating their agreement for the marriage to continue after transition.<sup>363</sup> If the other criteria unrelated to marriage are met, a full gender recognition certificate will be issued.<sup>364</sup> If the other party to the marriage does not agree to

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<sup>358</sup> Gender Recognition Act 2004 ch. 7 s5(1) prior to amendment by Marriage and Civil Partnership (Scotland) Act 2014 asp 5

<sup>359</sup> Civil Partnership Act s88(1)

<sup>360</sup> Civil Partnership Act 2004 s96(2)

<sup>361</sup> Gender Recognition Act 2004 s25(1)

<sup>362</sup> Gender Recognition Act 2004 s25(1)

<sup>363</sup> Gender Recognition Act 2004 s3(6D)(a)

<sup>364</sup> Gender Recognition Act 2004 s5(1)

the marriage continuing after the transition,<sup>365</sup> an interim gender recognition certificate will be issued<sup>366</sup> until the court grants a decree of divorce on the ground that an interim gender recognition certificate has been granted. After this the court will issue a full gender recognition certificate.<sup>367</sup>

In the case of civil partners, the law is similar. A civil partnership becomes a ‘protected Scottish civil partnership’<sup>368</sup> or ‘protected civil partnership’.<sup>369</sup> This protection is limited however as the civil partnership will only continue, and a full gender recognition certificate will only be issued if the other party to the protected civil partnership or protected Scottish civil partnership<sup>370</sup> has also been issued with a gender recognition certificate.<sup>371</sup> If only one of the parties sought a gender recognition certificate after registering the civil partnership this would result in the dissolution of the civil partnership due to the same-sex requirements of civil partnership.<sup>372</sup> The couple in these circumstances could, of course, marry.

The general rule for eligibility to marry<sup>373</sup> or enter a civil partnership<sup>374</sup> is that both parties must be at least 16 years of age. Whilst technically possible to marry at 16 for both transsexuals and transgender individuals, it is not possible to obtain a gender recognition certificate until at least the age of 18<sup>375</sup> and after living in the gender the individual wishes to legally acquire for two years. Essentially, this means that for an individual seeking a gender recognition certificate to enable them to marry or enter a civil partnership in the gender they wish to acquire, they must be at least 18 to do so.

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<sup>365</sup> Gender Recognition Act 2004 s3(6D)(b)

<sup>366</sup> Gender Recognition Act 2004 s4(3)(a)

<sup>367</sup> Gender Recognition Act 2004 s5(1)(b)

<sup>368</sup> Gender Recognition Act 2004 s25(1)

<sup>369</sup> Gender Recognition Act 2004 s25(1)

<sup>370</sup> Gender Recognition Act 2004 s4(3C)b

<sup>371</sup> Gender Recognition Act 2004 s4(2)(c)

<sup>372</sup> Civil Partnership Act 2004 s86(1)(a)

<sup>373</sup> Marriage (Scotland) Act 1977 s1(1)

<sup>374</sup> Civil Partnership Act 2004 s 86(1)(c)

<sup>375</sup> Gender Recognition Act 2004 s1(1)

### 3(4)(3) The Gender Recognition Act 2004

The Gender Recognition Act 2004 was created due to a legal challenge to the gender rules for marriage at that time.<sup>376</sup> Eligibility to marry was determined by the gender assigned to the parties at birth, meaning that transsexuals were unable to marry persons of the opposite sex to their confirmed gender after surgery. At that time, any marriage between two persons who were the same-sex at birth was *void ab initio*.<sup>377</sup> Christine Goodwin challenged this. Designated male at birth, at the time of her application to the European Court of Human Rights, Christine was a post-operative male-to-female transsexual who wished to marry a man. She was not able to do so as a result of the decision in *Corbett v Corbett*,<sup>378</sup> which had decided that gender was chromosomal, gonadal, genitally determined at birth and unchangeable legally.<sup>379</sup> Goodwin successfully argued that the prohibition on allowing her to change her gender on her birth certificate to recognise her confirmed gender, and her resultant ineligibility to marry a man, was a violation of her Article 8 right to a private and family life,<sup>380</sup> and her Article 12 right to marry,<sup>381</sup> rights guaranteed under the European Convention on Human Rights. The European Court found in her favour, and the UK government was compelled to legislate to allow her, and other transsexuals, to amend their birth certificates to reflect their acquired gender.<sup>382</sup> Marriage law was not changed or altered, the law on gender recognition was.

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<sup>376</sup> *Christine Goodwin and I v United Kingdom* [2002] 2 FCR 577

<sup>377</sup> *Corbett v Corbett* [1970] 2 All ER 33

<sup>378</sup> *Corbett v Corbett* [1970] 2 All ER 33

<sup>379</sup> *Corbett v Corbett* [1970] 2 All ER 33 Ormrod at page 100

<sup>380</sup> European Convention on Human Rights, Article 8

<sup>381</sup> European Convention on Human Rights Article 12

<sup>382</sup> Gender Recognition Act 2004

The Gender Recognition Act 2004 has been described as progressive,<sup>383</sup> a ‘turning point in conventional human rights discourse on gender identity’<sup>384</sup> and, indeed, ‘Butlerian’ as it replaced the concept of ‘sex’ with that of ‘gender’.<sup>385</sup> Critiques of the Act<sup>386</sup> however recognise that it perpetuates the presumption that transsexualism is a mental illness<sup>387</sup> known as gender dysphoria,<sup>388</sup> and that gender confirmation, be it surgical or non-surgical, should be intended to be a permanent change<sup>389</sup> with the ultimate aim of surgical alignment if viable.<sup>390</sup> So, whilst surgery is not a pre-requisite, at the time considered very progressive,<sup>391</sup> it is presumed to be the intention of the applicant if medically possible. The applicant for a Gender Recognition Certificate is also required to have lived in their chosen gender for two years<sup>392</sup> and the agreement of a panel of medical professionals is necessary to allow for the gender recognition process to be completed<sup>393</sup> – self-definition of gender was not, and is not currently permissible.

The Gender Recognition Act 2004 should not be underestimated; allowing transition for those who identify with the gender binary is not insignificant and it has surely had a positive impact on the approximately 3500 individuals who have gone through gender confirmation since 2005.<sup>394</sup> However, I would suggest that there is a philosophical

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<sup>383</sup> Andrew N Sharpe, *A Critique of The Gender Recognition Act 2004*, Bioethical Inquiry (2007) 4:33–42 at 37

<sup>384</sup> Peter Dunn *Ten years of gender recognition in the United Kingdom: still a "model for reform"* P.L. 2015, Oct, 530-539 at 532

<sup>385</sup> Andrew N Sharpe *Endless Sex: The Gender Recognition Act 2004 and the persistence of a legal category* Feminist Legal Studies (2007) 15:57–84 at 57

<sup>386</sup> Gender Recognition Act 2004 s1(1)(3)

<sup>387</sup> Andrew N Sharpe, *A Critique of The Gender Recognition Act 2004*, Bioethical Inquiry (2007) 4:33–42 at 38

<sup>388</sup> Gender Recognition Act 2004 s2(1)(a)

<sup>389</sup> Gender Recognition Act 2004 2(1)(c)

<sup>390</sup> David Lammy MP in House of Commons Standing Committee A, 9 March 2004, Col. 19, cited in Andrew N Sharpe, *A Critique of The Gender Recognition Act 2004*, Bioethical Inquiry (2007) 4:33–4239

<sup>391</sup> Andrew N Sharpe, *A Critique of The Gender Recognition Act 2004*, Bioethical Inquiry (2007) 4:33–42 at 37

<sup>392</sup> Gender Recognition Act 2004 2(1)(b)

<sup>393</sup> Gender Recognition Act 2004

<sup>394</sup> *Ministry of Justice, Gender Recognition Statistics (20042013)*, <https://www.gov.uk/government/collections/gender-recognition-certificate-statistics> Accessed September 19 2016.

disconnect between aim of the Act and implementation, particularly if a queer approach is taken.

What the Gender Recognition Act 2004 clearly allows is the legal transition from one gender to another. By allowing for a formal change from one gender to another, there appears to be at least an implicit acceptance that that male or femaleness is not necessarily correctly designated at birth.<sup>395</sup> The Act uses the term ‘acquired’ gender to signify the gender after the issue of a gender recognition certificate; acquisition is also how De Beauvoir and Butler discuss gender –one ‘becomes’ a gender, or more accurately for De Beauvoir, one becomes a woman. Certainly, linguistically the use of the terminology of acquisition seems to infer that legislators accepted the social constructivist underpinnings of the concept of gender, and I would argue that queer theory has clearly influenced this approach to gender. However, despite this, in implementing the Act, the focus remains cosmetically anatomical, and the continuation of the pathologising approach to transsexualism remains pervasive.

The gender of the person seeking a gender recognition certificate is ultimately decided by the medical professionals who will agree to issue the certificate, not by the person themselves. This approach to gender confirmation is arguably dehumanising as it removes the applicant’s agency to self-identify. A refusal to issue a certificate leaves the person legally the gender they were designated at birth and it must surely be asked how a gender recognition certificate could possibly be issued to a person who does not identify with the gender binary, but is, none the less, designated ‘gender dysphoric’. The Act offers no engagement with the possibility of non binarism and therefore the gender binary itself remains unchallenged by the concept of transition. Thus far, queer influence seems confined to acceptance of change within the gender binary.

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<sup>395</sup> Sharon Cowan *Gender is no substitute for sex: A Comparative Human Rights Analysis of the legal regulation of sexual identity*, Feminist Legal Studies, (2005) 13:67–96 at page 72

It is fitting that a legal challenge borne from a desire to marry should result in legislation that contains provisions specific to marriage and civil partnership. At the time of the introduction of the Gender Recognition Act 2004, the maintenance of the gender binary supported the continuation of the hetero-exclusivity of marriage; indeed, it has been suggested that in some ways, the Gender Recognition Act 2004 was created for this very reason.<sup>396</sup> This is perhaps revealed in the provisions that required a married applicant for a gender recognition certificate to divorce before the issuance of a full gender recognition certificate. The ‘divorce / dissolution requirement’ has been criticised<sup>397</sup> and as previously noted, it is no longer the case in Scotland that all marriages have to end in divorce for the issuance of a full gender recognition certificate. However, the European Court of Human Rights has held that signatory states may indeed require the dissolution of a marriage before allowing the right of legal gender recognition<sup>398</sup> and it remains the case that those in a civil partnership will still generally be required to dissolve this before a full gender recognition certificate is issued unless the other party to the civil partnership has also applied for a gender recognition certificate.<sup>399</sup>

It is conceded that the progressiveness of the Gender Recognition Act 2004 has been somewhat overtaken by continued developments and approaches to increasingly visible trans and gender issues. The concept of gender binarism itself is now being criticised more openly and recognition is increasingly sought for fluid and non-binary genders. The Scottish Government has, and it should be noted, with little controversy, announced that it plans to revisit gender recognition, and that their intention is to recognise non-binary and fluid genders. As the enforcement of binarism is, I would suggest, a major weakness in the

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<sup>396</sup> Andrew N Sharpe *Endless Sex: The Gender Recognition Act 2004 and the persistence of a legal category* Feminist Legal Studies (2007) 15:57–84 at at 60

<sup>397</sup> See for example Peter Dunn *Ten years of gender recognition in the United Kingdom: still a "model for reform"?* P.L. 2015, Oct, 530-539 at 534

<sup>398</sup> *Hamalainen v Finland* (37359/09) 37 B.H.R.C. 55 (ECHR (Grand Chamber))

<sup>399</sup> Gender Recognition Act 2004 s4(3)(c)



legislation and the area in which queer influence is least present, this is welcome. The Gender Recognition Act 2004 has, I would suggest, been historically utilised as a tool for the maintenance of the gender binary and the enforcement of gender rules that, despite same-sex marriage now being permitted, persist within marriage and civil partnership.

### 3(4)(4) Gender of parties to a marriage and civil partnership

Whilst the gender of the parties to a marriage is superficially not relevant in Scotland, it appears, on the face of it, that both parties must be either male or female – a binary gender designation is still necessary. This excludes those who are gender non-binary, a legal status recognised in a number of countries.<sup>400</sup> In Scotland, and the rest of the UK, there is currently<sup>401</sup> no legal status for those who are gender non-binary, and therefore, if born in the UK, a person self-defining as gender non-binary would have a binary designation of male or female on their birth certificate, allowing them to marry in any case – albeit that they would marry with a gender designation that they do not accept as their own. However, what is unclear is whether a person legally designated as a third gender in another jurisdiction would be able to marry in Scotland, or if they had married outside of Scotland, if their marriage would be valid?

The statute gives no guidance on whether a third-gendered individual could marry in Scotland. The gender neutrality of the law in terms of capacity, on a reading of the statute shows only that same-sex or opposite-sex marriage is permissible; in terms of civil partnership, same-sex couplings are all that are allowed.<sup>402</sup> The statute suggests that to marry

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<sup>400</sup> Michael Bochenek & Kyle Knight, *Nepal's Third Gender and the Recognition of Gender Identity*, JURIST - Hotline, Apr. 23, 2012, <http://jurist.org/hotline/2012/04/bochenek-knight-gender.php> accessed September 19 2016

<sup>401</sup> The Scottish Government recently announced proposals on review and reform gender recognition law, so it's in line with international best practice for people who are Transgender or Intersex see SNP Manifesto 2016 at 21 accessed online at <http://www.snp.org/manifesto> on September 19 2016

<sup>402</sup> Civil Partnership Act 2004 s86(1)(a)

in Scotland the gender of either party must at least be defined in line with the binary – this would particularly be the case if the wedding was a religious wedding as the religious freedom protections put in place depend largely on the gender of the parties to the marriage. In a civil partnership, it is certainly the case that the parties must have a defined gender, and that the gender must be the same for each party.<sup>403</sup>

Whether a foreign marriage to a third gender individual would be legally valid in Scotland is in the realms of international private law. In the absence of any specific literature or commentary on this area, it is helpful to look to the discussions on the recognition of same-sex marriages before 2014. Norrie wrote in 2004<sup>404</sup> that he believed a Scottish court would give effect to the consequences of a Dutch same-sex marriage, despite, same-sex marriage not being permitted in Scotland at that time.<sup>405</sup> The approach in recognising foreign marriages has been that, unless there are public policy concerns against doing so, the court has the discretion to accept the validity of the marriage.<sup>406</sup> In other jurisdictions where same-sex marriage is not permissible, similar decision have been reached regarding the validity of same-sex marriages conducted abroad<sup>407</sup> – legal effect is given to the union to the extent that it would be given to an opposite-sex union. I would argue that it is likely that the marriage of a person who is legally defined as a third gender would be given legal effect, if the marriage was entered into outside of Scotland; I do not, however, consider that a person legally defined as a third gender would necessarily be able to marry in Scotland, and it seems certain that they would be unable to enter a civil partnership. Again, it must be expected that the

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<sup>403</sup> Civil Partnership Act 2004 s86(1)(a)

<sup>404</sup> Kenneth McK. Norrie Would Scots law recognise a Dutch same-sex marriage *Edinburgh Law Review* Edin. L.R. 2003, 7(2), 147-173

<sup>405</sup> Kenneth McK. Norrie Would Scots law recognise a Dutch same-sex marriage *Edinburgh Law Review* Edin. L.R. 2003, 7(2), 147-173 at 172

<sup>406</sup> Kenneth McK. Norrie Would Scots law recognise a Dutch same-sex marriage *Edinburgh Law Review* Edin. L.R. 2003, 7(2), 147-173 at 151

<sup>407</sup> See for example Case 113/2014 Unreported April 9, 2014 (Trib I): Civil Court of Grosseto: Ottati, President: 9 April 2014 where the Italian courts held that a same sex marriage conducted abroad should be recognized despite same-sex marriage being illegal in Italy.

proposed changes to gender recognition in Scotland will address this as far as marriage is concerned.

I think that it is clear that in terms of gender, queer theory has had some influence. The creation of the Gender Recognition Act 2004 was undoubtedly the result of a legal challenge, however, queer theory has, I would suggest, influenced, and continues to influence the societal acceptability of gender alignment and gender identity within, and outwith the gender binary.

Where The Gender Recognition Act 2004 interfaces with the law on marriage and civil partnership, I would argue that the Act was, and remains a useful tool in maintaining the hetero-exclusivity of marriage, and the homo-exclusivity of civil partnership. It does this utilising divorce and dissolution requirements before an applicant can be issued with a full gender recognition certificate. Whilst the divorce requirement has been repealed in Scotland in some circumstances, and is increasingly no longer a determinant in other jurisdictions where same-sex marriage is permissible,<sup>408</sup> there will generally be a dissolution requirement if the applicant for a gender recognition certificate is in a civil partnership. The insistence on maintaining gender requirements within both institutions was a demonstration of the peripheral influence queer theory had on the concept of gender when the Act was created; the proposed Scottish Government changes are, I would argue, evidence that queer theory has continued to influence the concept of gender.

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<sup>408</sup> Peter Dunn *Rethinking legal gender recognition: recent reforms in Argentina, Denmark and the Netherlands* March 2015 International Family Law 41-45 at page 45

### 3(5) The influence of gender binarism on parties to a marriage or civil partnership

Gender binarism has, I would argue, had an influence of the structure of marriage and civil partnership most clearly evident in the requirement that only two people may be parties to a marriage or civil partnership. Sexuality and marriage are both evolutions of what Foucault called the device of ‘alliance’. It seems uncontroversial to claim that, certainly in western culture, the ‘couple’ structure of marriage has historically developed as an element of the essentialist discourse that presumed the complementary<sup>409</sup> nature of both genders in relation to their roles within marriage. In terms of the law, this presumed complementarianism was mirrored when the law on civil partnership was created.

The insistence that any marriage or civil partnership in Scotland can be constituted between only two people is further evidence of state interference within personal relationships and is area for criticism from a queer perspective. Any truly queer union would not be so prescriptive. I would also argue that it is reflective of the historic opposite-sex requirements for marriage, mirrored in the structure of civil partnership. The right of sexual minorities to have formalised plural relationships recognised is absent entirely from consideration.

I would argue that plural marriage is generally, and largely justifiably, presented as hyper-patriarchal due to the fact that, as practiced, it tends to be polygynous, meaning that men can take additional wives, but women can have only one husband.<sup>410</sup> I think it also necessary to acknowledge that there are legitimate concerns that in many circumstances, plural marriage is often not truly consensual due to the age, capacity or willingness of the parties, usually the female, to the marriage. The solution, offered without flippancy to the

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<sup>409</sup> McK. Norrie Kenneth Now *the dust has settled: The Marriage and Civil Partnership (Scotland) Act 2014* Jur. Rev. 2014, 2, 135-163 at 139

<sup>410</sup> R Leckey and K Brooks *Queer Theory: Law, Culture and Empire* Routledge; Reprint edition (2011) at 138

later problem lies, of course, in ensuring consent through strong anti-forced marriage legislation. Hyper-patriarchy is more difficult to legislate against; however, if permitted in Scotland, plural marriages would be taking place in a country and culture where gender equality is more visible. In these circumstances, isn't it possible that more polyandrous structures would emerge?

Whilst it must be conceded that most people who are in a relationship, whether in same-sex or opposite-sex relationships, are in a relationship with a significant other rather than significant *others*,<sup>411</sup> there are people who choose to live in relationships that are polyamorous, involving more than just two people, and who do not do so for religious or cultural reasons.

Historically, the western aversion to plural marriage has its roots in the Christian tradition which endows privilege on opposite-sex monogamy.<sup>412</sup> The often used description of marriage from *Hyde v Hyde*<sup>413</sup> was, it has been suggested, necessary to distinguish monogamous Christian marriage from its polygamous Mormon counterpart.<sup>414</sup> The use of the threat of plural marriage as a defence against same-sex marriage<sup>415</sup> demonstrates that the objections to plural marriage have some of the same roots as objections to same-sex marriage, and same-sex relationships in general. Opponents of change argue that social instability will follow, using their position of privilege to suppress a minority interest<sup>416</sup> despite there being little evidence to support their supposition.

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<sup>411</sup> See generally June Carbone *Examining the biological bases of family law: lessons to be learned for the evolutionary analysis of law* Int. J.L.C. 2006, 2(3), 277-292 where she demonstrates that whilst there is almost global evidence of relationships based on a couple structure, there is no evidence to suggest that this structure leads to permanence.

<sup>412</sup> Ronald C Den Otter, *In defence of plural marriage* Cambridge University Press (2015) at 259

<sup>413</sup> *Hyde v Hyde* (1865-69) L.R. 1 P. & D. 130 (Divorce Ct)

<sup>414</sup> Rebecca Probert *Hyde v Hyde: defining or defending marriage* C.F.L.Q. 2007, 19(3), 322-336

<sup>415</sup> See for example <http://scotlandformarriage.org> accessed September 19 2016

<sup>416</sup> Will Kymlicka, *Rethinking the Family* Philosophy & Public Affairs 20.1 (1991): 77-97 at 94

From a public policy perspective, I believe that it is irrational to accept that plural marriages conducted outside of Scotland should be given legal effect,<sup>417</sup> whilst, at the same time, refusing to allow these marriages to be constituted within Scotland. The valid concerns raised about consent and gender equality would be subject to regulation if plural marriages and civil partnerships were subject to the same scrutiny as their monogamous counterparts. If the public policy argument is therefore flawed, is there justification for refusing to recognise plural marriage and civil partnerships from the perspective of legal complexity?

The benefits that accrue to a partner on marriage and civil partnership range from residency for immigration purposes,<sup>418</sup> inherited titles and courtesy titles, tax breaks, welfare and benefit rights, succession rights where one party dies, and rights in circumstances of divorce or dissolution. The right to benefits, succession rights on the death of a spouse or civil partner, or to property rights on divorce or dissolution are the most common encounters where marital or civil partnership status may make a difference.

In a monogamous relationship, in circumstances where one party to a marriage or civil partnership dies, the distribution of property in these circumstances is likely, I would suggest, to be relatively straightforward, and will follow the law of succession or the rule of the court. It is likely to be the same in most circumstances when couples terminate their relationship by divorce or dissolution. However, the lack of specific guidance within the legislation on how to distribute property in plural marriage situations is not due to legal complexity.

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<sup>417</sup> Private International Law (Miscellaneous Provisions) Act 1995 ch.42 s7

<sup>418</sup> A recent interesting case where marital status has been considered for immigration purposes is *SB (India) v Secretary of State for the Home Department* [2016] EWCA Civ 451. In this case two foreign student who had entered a civil partnership and then same-sex marriage with one another whilst studying in England were denied leave to remain here after studying, despite the difficulties they may experience when returning to India where neither civil partnership or same-sex marriage are recognized. Despite this, the court held that the couple's right to private and family life guaranteed under Article 8(1) was not breached.

An example of how the UK legal system is able to approach the complexity of plural marriages can be seen in the administration of state benefits. Whilst the UK will accept that some people live in plural marriages, the benefit system will not allow the married parties to claim as a single unit.<sup>419</sup> In income related benefit claims, the tendency is that two parties to the plural marriage will make a claim as a couple; other parties to the marriage can make single claims. A different regime comes into play however, where access to the contributions of a spouse may be relevant. This usually occurs when a partner dies, leaving the other party able to access their contributions as a widow's benefit. One might expect that this benefit would be distributed equally among the surviving parties to the marriage. However, instead, no surviving party to the marriage is able to access widow's benefit.<sup>420</sup> The rationale for this is not that it is complex to do so, but that only those in 'legally recognised unions' may inherit certain rights. The European Court of Human Rights has upheld this approach as being legitimate and non-discriminatory in favouring monogamy over polygamy.<sup>421</sup>

Polygamous rights of succession would be another area where one might expect extra complexity when compared to monogamous rights of succession. There have been a number of cases before the English courts which have upheld the rights of surviving spouses in plural marriages to make a claim for provision from the estate.<sup>422</sup> The most recently settled approach in cases of intestacy, allots a single spousal portion of the estate to be distributed between the surviving spouses, rather than allowing individual spousal claims.<sup>423</sup> This is to

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<sup>419</sup> See submission to DWP

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/221283/submission-to-sos-091106.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221283/submission-to-sos-091106.pdf) accessed September 19 2016 explaining the UK government definition of polygamy and how benefits will be calculated in these situations.

<sup>420</sup> Ibid at point 14 page 3 upheld in *Bibi v Chief Adjudication Officer* Times, July 10, 1997 (CA)

<sup>421</sup> CP/3114/2003 (Unreported, November 25, 2005) (SS Comm) cited in *Journal of Social Security Law* Case Comment 'Widow's benefit - polygamous marriages - discrimination under Art.14' .S.S.L. 2006, 13(2), D64

<sup>422</sup> See for example *Sehota (deceased) Re* [1978] 3 All E.R. 385 where the general principle was affirmed and more recently *Official Solicitor to the Senior Courts v Yemoh and Others* [2010] EWHC 3727 (Ch), [2011] 1 WLR 1450, [2011] 2 FLR 371

<sup>423</sup> *Official Solicitor to the Senior Courts v Yemoh and Others* [2010] EWHC 3727 (Ch), [2011] 1 WLR 1450, [2011] 2 FLR 371

avoid the intestate estate being extinguished by spousal claims and leaving no residue for any children. A similar approach in Scotland would allot the prior rights portion of an intestate estate to the surviving spouses leaving anything remaining to settle the legal rights of any issue. From the perspective of legal complexity, succession law is clearly able to deal with a scenario where there is more than one spouse.

These rights in succession, divorce and dissolution can be contrasted with similar rights that the Family Law (Scotland) Act 2006 introduced for cohabitants when a relationship ends due to the death or breakup of the cohabitant relationship.<sup>424</sup> The law does not prohibit anyone from living with, and having romantic relations with as many people as they chose although in terms of the Family Law (Scotland) Act 2006, a cohabitant is defined as two persons of the same<sup>425</sup> or opposite sex<sup>426</sup> living together as though married or in a civil partnership. When considering whether someone is a cohabitant in terms of the Family Law (Scotland) Act 2006, the court will consider the length of cohabitation,<sup>427</sup> the nature of the relationship<sup>428</sup> and the financial arrangements between the parties.<sup>429</sup>

What I believe is interesting about the Family Law (Scotland) Act 2006 is that nothing in The Act states that a person cannot be in a cohabitant relationship with more than one person – for example, Jane cohabits with Jack in Glasgow, but works in Aberdeen where she cohabits with Janet. All parties are aware of and consent to the relationships. Whilst initially it could appear that these relationships would be difficult to define as relationships where the parties live together as though married or in a civil partnership, as required by the

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<sup>424</sup> Family Law (Scotland) Act 2006 asp.2

<sup>425</sup> Family Law (Scotland) Act 2006 s25(1)(a)

<sup>426</sup> Family Law (Scotland) Act 2006 s25(1)(b)

<sup>427</sup> Family Law (Scotland) Act 2006 s25(2)(a)

<sup>428</sup> Family Law (Scotland) Act 2006 s25(2)(b)

<sup>429</sup> Family Law (Scotland) Act 2006 s25(2)(c)



Act,<sup>430</sup> it is submitted that nothing in marriage or civil partnership law prevents parties agreeing to non-monogamous relationships and that consequently, nothing prevents a relationship like Jane, John and Janet's being defined as a cohabitant relationship in terms of the Act.

The provisions of the Family Law (Scotland) Act 2006 show that it is possible for the law to take an approach where monogamy may not necessarily be the starting point. The approach of the court in these circumstances will be nuanced and specific to the life of the parties involved, although it must be said that a determination will be made from outside of the relationship on whether the relationship qualifies as a 'cohabitant' relationship measured against marriage or civil partnership as a starting point. I would argue however, that the Family Law (Scotland) Act 2006 has the potential to bring, in some circumstances, some benefits similar to those enjoyed by those in marriages and civil partnerships to those in plural relationships. The potential provision of these benefits demonstrates that the law is capable of dealing with non-monogamous relationships and shows that it is therefore not impossible legal complexity that prevents plural relationships being given access to marriage and civil partnerships with their attendant benefits and responsibilities, but public policy to elevate monogamous relationships as the societal and legal norm.

Marriage and civil partnership remain structurally built around a two-person formulation. Despite same-sex marriage and civil partnerships being permitted, validity is still only given to those relationships which are analogous to relationships which are structurally based around gender essentialist foundations. Although superficially, the gender of the parties to a marriage has diminished in importance, once the surface has been breached, it is clear that the influence of gender is still relevant in both the structure of marriage, and the restrictions on the number of parties to a marriage. Plural marriage, whilst acceptable in some

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<sup>430</sup> Family Law (Scotland) Act 2006 s25(1)

circumstances in Scotland has not been as a result of queer influence; plural marriages have, I would argue, a diminished legal and social status demonstrating that queer theory has not influenced the over-riding monogamous expectations of marriage and civil partnership. A refusal to allow plural marriage from a queer perspective, is a refusal to allow people to structure their relationships on a basis that suits them alone. The law the parties to a marriage and civil partnership remains decidedly heteronormative.

### 3(6) Religious and Belief Marriage and Civil Partnership:

Marriage and civil partnership ceremonies in Scotland can be civil or religious in nature. The legal implications for the parties concerned after either ceremony are identical. It is the intention of this final section to explain the law on religious marriage and civil partnership ceremonies and demonstrate that whilst equality-led discourse has predominated in the marriage equality debate in Scotland, it has proven to be somewhat less effective in ensuring that same-sex couples have access to religious marriage. A clash of rights and persuasive discourse from both sides of the argument have meant that religious organisations now have a statutory right to discriminate on the basis of the gender of parties to a marriage. Equality-led discourse will, I will argue, be ineffective in overcoming this, and only a radical rethink on religious marriage which removes the right of religious organisation to legally marry all Scottish couples will resolve this issue.

#### 3(6)(1) Religious and belief marriages and civil partnership ceremonies

For some, marriage is a religious sacrament, rather than, or as well as, a civil status. For others, it is a celebration that is borne of their belief in humanism or some other belief

system. The law relating to the celebration of religious or belief marriage ceremonies is slightly different to that of civil marriage. Civil partnership, until recently an institution that mirrored civil marriage only, has been modified to include a religious and belief element to allow those who wish to have their civil partnership celebrated religiously to do so. What follows will examine the law on celebration of opposite-sex marriage, same-sex marriage and registration of civil partnership in a religious or belief context.

Where a marriage between persons of different sexes is to be formalised in a religious marriage ceremony, the marriage may be solemnised by a minister or deacon of the Church of Scotland, these ministers or deacons being automatically authorised to carry out mixed-sex religious weddings.<sup>431</sup> It should be noted that the Church of Scotland is not automatically authorised to carry out same-sex marriage ceremonies<sup>432</sup> or religious civil partnership ceremonies,<sup>433</sup> and would have to apply to do so as an organisation.

A minister, clergyman, pastor, priest, celebrant or someone recognized by other religious or belief bodies as being someone entitled to solemnise marriages of people of different sexes on their behalf may also seek permission from the Scottish Ministers<sup>434</sup> to perform religious or belief wedding ceremonies.<sup>435</sup> These same religious or belief bodies may also seek permission to perform same-sex wedding ceremonies,<sup>436</sup> and/or religious or belief civil partnership ceremonies.<sup>437</sup> The difference between opposite-sex religious and belief wedding ceremonies, and same-sex religious and belief wedding and civil partnership ceremonies is that the minister, clergyman, pastor, priest, celebrant or other person may not

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<sup>431</sup> Marriage (Scotland) Act 1977 s8(a)(i)

<sup>432</sup> Marriage (Scotland) Act 1977 s9(1A)

<sup>433</sup> Civil Partnership Act 2004 s94A(2)(a)

<sup>434</sup> Marriage (Scotland) Act 1977 s8(1)(A)

<sup>435</sup> Marriage (Scotland) Act 1977 s8(a)(ii)

<sup>436</sup> Marriage (Scotland) Act 1977 s8(1)(B)(a)(i)

<sup>437</sup> Civil Partnership Act 2004 s94A(2)(a)

be compelled to perform same-sex marriage<sup>438</sup> or civil partnership<sup>439</sup> ceremonies if they choose not to do so. Similarly, religious and belief organisations cannot be compelled to opt-in to perform same sex marriage<sup>440</sup> and civil partnership<sup>441</sup> ceremonies. The provisions state that they are for the purpose of clarity and can be contrasted with civil marriage and civil partnership where there simply is no opt-in or opt-out procedure for registrars. The inference must be here that religious conviction, however keenly held, is viewed as having no place in the administration of a civil function, and indeed, a legal challenge by a registrar in London to exempt herself from celebrating civil partnership ceremonies failed, finding that the prohibition of discrimination by the Equality Act (Sexual Orientation) Regulations 2007 took precedence over any right she would otherwise have by virtue of her religious belief or faith to practice discrimination on the ground of sexual orientation.<sup>442</sup>

Scotland differs from many jurisdictions in so far as a religious or belief marriage or civil partnership has legal validity. In other jurisdictions, only the civil marriage ceremony is able to legally marry the parties.<sup>443</sup> A religious wedding ceremony in these countries must be preceded or superseded by this civil ceremony if the marriage is to have any legal validity in the eyes of the state. Marriage in these jurisdictions is a state function, a function of law, and it is therefore the duty of the state to marry the parties, not their place of worship. In Scotland marriage and civil partnership are state institutions either administered by the state alone in the case in civil marriage and civilly registered civil partnership, or outsourced to

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<sup>438</sup> Marriage (Scotland) Act 1977 s8(1D)(d)

<sup>439</sup> Civil Partnership Act 2004 s94A(3)(d)

<sup>440</sup> Marriage (Scotland) Act 1977 s8(1D)(a)

<sup>441</sup> Civil Partnership Act 2004 s94A(2)(a)

<sup>442</sup> *Ladele v Islington LBC* [2009] EWCA Civ 1357

<sup>443</sup> An example of this can be seen in the French law in relation to marriage. Article 75 specifies that a marriage must be conducted in a town hall by an 'officer of civil status'. French Code Civil Article 75 accessed on September 19 2016 at <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> translated by David W. Gruning, Professor of Law, Loyola University, School of Law, New Orleans 2014

permitted religious and belief organisations in the case of religious marriage and religious or belief civil partnership.

There are two ways to view the legislative provisions that endow both religious organisations and religious celebrants with the right to permit a civil function in a discriminatory way. Article 9 of the European Convention on Human Rights protects the right to believe and manifest one's religion; the objections to same-sex marriage by religious organisations are based on theological justifications and the provisions allowing religious organisations and celebrants to refuse to perform same-sex unions is a proportionate way to protect their Article 9 rights. Legal rights aside, it is also arguable that allowing religious marriage and civil partnership ceremonies generally is a demonstration of pluralism and tolerance and further demonstrates that marriage is a social and religious status, as well as a legal status. This approach has been supported by those who believe that the religious protections afforded to religious organisations and celebrants are an appropriate way to ensure individual and religious group autonomy.<sup>444</sup>

There is of course, another way to view these religious protections and that is that religious and belief organisations have been given an unjustifiable statutory right to discriminate against same-sex couples. Norrie notes that it is peculiar that religious organisations are permitted to create an institution with only civil effects in terms of the law.<sup>445</sup> He notes also that it is clear when looking at the position of the Church of Scotland within the legislation that it has a 'special place',<sup>446</sup> in legislative terms, in relation to opposite-sex marriage. Automatically endowed with the right to perform opposite-sex

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<sup>444</sup> See for example Rex Ahdar *Solemnisation of same-sex marriage and religious freedom* in Ecclesiastical Law Journal Ecc. L.J. 2014, 16(3), 283-305 at page 305 and Kenneth McK. Norrie *Now the dust has settled: The Marriage and Civil Partnership (Scotland) Act 2014* Jur. Rev. 2014, 2, 135-163

<sup>445</sup> Kenneth McK. Norrie, *Accommodating religion to the gay imperative in family law*, page 329 in Jane Mair and Esin Örüçü (eds.) *The Place of Religion at in Family Law: A Comparative Search*, Interserntia Ltd (Cambridge 2011)

<sup>446</sup> Kenneth McK. Norrie *Now the dust has settled: The Marriage and Civil Partnership (Scotland) Act 2014* Jur. Rev. 2014, 2, 135-163 at 152

weddings, the lack of this automatic right in relation to same-sex wedding ceremonies ensures that the Church of Scotland<sup>447</sup> is enabled to discriminate against same-sex couples in the same way as other religious organisations.

Fundamentally, I would argue that in allowing a state function to be administered in a discriminatory way, the state sanctions and allows for same-sex relationships to be held in diminished importance at both a state and social level. By articulating, it is submitted, unnecessarily,<sup>448</sup> that religions and religious celebrants can discriminate on the basis of the gender and presumed sexuality of parties to a marriage, the state ultimately sends the message that this discrimination is not only permissible legally, but also that it is acceptable to hold the view that one marriage has moral value that the other does not. Same-sex relationships have been held to constitute ‘family-life’<sup>449</sup> in terms of Article 8 of the ECHR; clearly, the state considers that in religious terms, it is acceptable to consider them a diminished form of family life.

It is interesting to contrast religious and belief marriage and civil partnership with civil marriage and civilly registered civil partnership. There are no provisions that allow registrars or registration districts to refuse to perform same-sex civil marriages or civil partnerships on religious grounds and indeed, it has been held that it is illegal to do so.<sup>450</sup> It must be asked why the religious belief of a registrar is of less importance than the religious belief of a celebrant. Both are performing a state function. Both are endowing parties with

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<sup>447</sup> The Church of Scotland is also interesting as it will allow its ministers and deacons to be in same-sex marriages, but will not perform them.

<sup>448</sup> I argue that this is unnecessary as religious organisations have, since time immemorial, refused to marry couples who they considered did not adhere to religious doctrine, without any legal challenge to their right to do so.

<sup>449</sup> *Schalk and Kopf v. Austria* Application no. 30141/04 at paragraphs 94-99

<sup>450</sup> *Ladele v Islington LBC* [2009] EWCA Civ 1357

identical rights and responsibilities, and yet, for a registrar, to discriminate in this way would certainly mean losing their job.<sup>451</sup>

I would suggest also that the permission to discriminate in this way actually opens a door to a legal challenge.<sup>452</sup> A religious wedding may be a religious sacrament to those participating in it, but it is also the administration a state function at the same time. In England, a registrar admitted that she would be unable to perform same-sex marriages due to her religious belief, and was subsequently sacked; she was later reinstated.<sup>453</sup> It must be stated that this case did not go through the courts, but that the fact that the council reinstated the registrar in question raises questions about the certainty the had about achieving a result similar to *Ladele*<sup>454</sup> where only the administration of civil partnership was considered. The two differing approaches are, I would argue, unjustifiable and create legal uncertainty.

Is there a queer solution to this disjointed approach to civil and religious marriage and civil partnership that the equality agenda has been unable to unify? I would suggest there is. Norrie argues that it will perhaps be only with the complete separation of church and state that true marriage equality for same-sex couples will be achieved, meaning that religious marriage ceremonies would have to be stripped of any legal validity.<sup>455</sup> He notes the danger in providing for specific legal exemptions in terms of sexuality, sending, as it does, the message that the demands of equality are weaker for this group than for others protected

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<sup>451</sup> *Ladele v Islington LBC* [2009] EWCA Civ 1357

<sup>452</sup> The prospect of allowing same-sex couples to marry in countries where established churches have the right to legally marry people was raised by Sir Tony Baldry as 'inevitable' in HC Deb 5 February 2013, vol 558, cols 144-145.

<sup>453</sup> <http://www.christianconcern.com/our-concerns/religious-freedom/victory-for-christian-registrar-dismissed-for-refusing-to-conduct-sam> September 19 2016

<sup>454</sup> *Ladele v Islington LBC* [2009] EWCA Civ 1357

<sup>455</sup> Kenneth McK. Norrie *Accommodating Religion to the Gay imperative in Family Law in The Place of Religion* at 330 in *Family Law: A Comparative Search* Eds Jane Mair and Esin Örücü Interserntia Ltd Cambridge 2011

minority groups;<sup>456</sup> he suggests that only the secularisation of legal personal relationship is the solution<sup>457</sup> and I would agree.

In terms of queer influence, it hardly needs stating that religious organisations have not been influenced by queer theory. What is clear, however, is that where religious marriage and civil partnership are concerned, queer theory has had no influence on the state approach to religious marriage and civil partnership and that opposite-sex marriage remains privileged within religious and belief organisations.

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<sup>456</sup> Kenneth McK. Norrie *Religion and same-sex unions: The Scottish Government's consultation on registration of civil partnerships and same-sex marriage* Edinburgh Law Review 2012 Edin. L.R. 2012, 16(1), 95-99 at page 98

<sup>457</sup> Kenneth McK. Norrie *Religion and same-sex unions: The Scottish Government's consultation on registration of civil partnerships and same-sex marriage* Edinburgh Law Review 2012 Edin. L.R. 2012, 16(1), 95-99 at page 99



## 4 Conclusion:

Marriage is an institution that, for many queer theorists, has historically been the locus of oppression for LGBTQI people. In many ways, the queer approach to relationships was antithetical to marriage and the creation of civil partnerships; both institutions continue to emanate a patriarchal state power which dictates how personal relationships should be structured and which simply reflect heteronormativity. The purpose of this thesis was, however, not to establish if marriage and civil partnership are queer institutions, but to establish if these institutions had been influenced in any way by queer theory.

On a social level, a queer critique of marriage and civil partnerships would focus on the social privilege of these institutions. Same-sex marriage has done nothing to ameliorate this privilege, and has instead, dispersed this privilege to a wider social group, rather than to all. Queer influence has been peripheral, if present at all, and marriage and civil partnership have remained institutions that privilege those willing to submit to prescriptive structures.

Foucault and Butler both exposed the artificiality of our gender and sexuality. What is clear, however, is that sexuality and gender remain embedded within the formative legal structures of marriage and civil partnership. Queer theory has only had borderline influence on gender and sexuality within the context of marriage and civil partnership and this influence can be seen only in so far as same-sex relationships have become viewed as morally equivalent to their opposite-sex counterparts. Even when gender has been legally accepted as changeable, the law has been used to affirm binarism and heteronormativity. Marriage and civil partnership remain embedded in a structure which has historically sought its validity in the complementary nature of the sexes; this structure has not changed and therefore, heteronormativism remains pre-eminent.

Finally, religious marriage and civil partnership remain completely insulated from queer theory in any discernible way. The legal protections put in place to ensure religious organisations could continue to morally condemn same-sex relationships have, if anything, made religious marriage more toxic than it was before. Not only this, but I would suggest that they have muddied what were, until then, legally clear waters. It is perhaps unsurprising that queer influence is completely absent here.

Marriage and civil partnership are relationships which insist on compliance. They are the relationship equivalent of a private member's club with prescriptive membership criteria. Queer is a rejection of what is the norm. Marriage and civil partnership could therefore never be queer institutions. This thesis sought to establish if, in spite of this, queer theory has had any influence on the law on marriage and civil partnership. The answer, I would submit, is that the influence of queer theory can be seen only on the margins.

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